

Wochnick, Heather M CIV USN (US)

From: Callaway, Rex CIV NAVFAC SW
Sent: Wednesday, February 10, 2010 12:18
To: Gilkey, Douglas E CIV OASN (I&E) BRAC PMO West; Macchiarella, Thomas L CIV OASN (I&E) BRAC PMO West; Forman, Keith S CIV OASN (I&E) BRAC PMO West; Kito, Melanie R CIV NAVFAC SW; Larson, Elizabeth A CIV OASN (I&E) BRAC PMO West; Cummins, John M CIV NAVFAC SW; Liotta, Rita M CIV WEST Counsel
Subject: FW: WSComparison_#63884196v1_LEGAL_USW_ - EPA 11-30-09 Revisions to AOC CLEAN VERSION-#63883781v1_LEGAL_USW_ - 2_10 AOC Draft(63884355_1).DOC
Attachments: WSComparison_#63884196v1_LEGAL_USW_ - EPA 11-30-09 Revisions to AOC CLEAN VERSION-#63883781v1_LEGAL_USW_ - 2_10 AOC Draft(63884355_1).DOC
Follow Up Flag: Follow up
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Doug, etc.

I was surprised to receive a revised draft AOC from Barry Steinberg late this morning. I haven't reviewed it yet but wanted to get it to you ASAP, given our meeting scheduled for tomorrow. Barry indicates that the draft AOC reflects some further evolution of their thinking on ETCA issues so we also appear to have a "moving target" with the ETCA. This will make our meeting next week even more challenging.

-Rex

-----Original Message-----

From: Steinberg, Barry P. [mailto:Barry.Steinberg@KutakRock.com]
Sent: Wednesday, February 10, 2010 11:37
To: Callaway, Rex CIV NAVFAC SW
Subject: FW: WSComparison_#63884196v1_LEGAL_USW_ - EPA 11-30-09 Revisions to AOC CLEAN VERSION-#63883781v1_LEGAL_USW_ - 2_10 AOC Draft(63884355_1).DOC

Rex,

Attached is a revised AOC, redlined against Bob Carr's 11/30 version. We propose several changes, designed primarily to clarify some issues and to reconcile AOC and ETCA language. Although the changes are not extensive, the issues associated with them will require consideration at our meeting next week. Gordon is the scribe for this effort, but it reflects our collective thoughts. Of course, all errors are solely his.

We are working on ETCA changes to what was sent to you previously. They will more closely track with what we have included here. One DTCA issue that we need to clarify pertains to ROD amendments and ESDs. The way we have worded it in the ETCA is cumbersome. I think we are in agreement that if they arise from our change to the project, our acts or omissions, then responsibility for them would be ours. But I do not think we have succinctly captured the concept. If you have suggestions, please provide.

If you have trouble opening this, let me know. I am working from home today due to the weather. You may have encountered big snow, but you have not suffered drivers and governments so poorly equipped to handle it.

Barry

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IN THE MATTER OF
FORMER HUNTER'S POINT NAVAL SHIPYARD

Respondents

San Francisco Redevelopment Agency and CP/HPS Development Co., LP

ADMINISTRATIVE ORDER ON CONSENT
FOR RI/FS AND RD/RA FOR CLEANUP
OF PORTIONS OF THE FORMER HUNTER'S POINT NAVAL SHIPYARD
U.S. EPA Region 9

CERCLA Docket No.

Proceeding under Sections 104, 106 and 122 of the Comprehensive Environmental Response,
Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9604, 9606, and 9622.

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I. JURISDICTION

1. This Administrative Order on Consent ("Order") is entered into voluntarily by the United States Environmental Protection Agency ("EPA"), the California Department of Toxic Substances Control ("DTSC"), the California Regional Water Quality Control Board, San Francisco Bay Region ("RWQCB"), and the San Francisco Redevelopment Agency ("SFRA") and CP/HPS Development Co. LP (referred to individually as "Respondent" and collectively as "Respondents"). The Order concerns the preparation and performance of one or more remedial designs and remedial actions ("RD/RA") for certain hazardous substances, pollutants, or contaminants present on Parcels G, and portions of Parcel B at the former Hunter's Point Naval Shipyard ("HPS") located at San Francisco ("Site"), described in Appendix A and depicted generally on the map attached as Appendix B) and the reimbursement for future response costs incurred by EPA, DTSC and RWQCB in connection with such CERCLA response actions.

2. This Order is issued under the authority vested in the President of the United States by Sections 104, 106 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9604, 9606 and 9622 ("CERCLA"). This authority was delegated to the Administrator of EPA on January 23, 1987, by Executive Order 12580, 52 Fed. Reg. 2926 (Jan. 29, 1987), and further delegated to Regional Administrators on May 11, 1994, by EPA Delegation Nos. 14-14-C and 14-14-D. This authority was further redelegated by the Regional Administrator of EPA Region 9 to the Superfund Branch Chief by Regional Delegation R9 1290.15, dated September 29, 1997. DTSC and the RWQCB sign this Order pursuant to relevant provisions of CERCLA Section 120 regarding state participation in federal facility cleanups, and Section 121(f), 42 U.S.C. §§ 9620 and 9621(f), and applicable provisions of 40 C.F.R. Subpart F, and the California Health and Safety Code, Division 20, Chapters 6.5, 6.67, 6.75, and 6.8, and the California Water Code, Division 7. The United States Department of Justice is approving and signing this Order pursuant to the authority of the Attorney General of the United States to compromise and settle claims of the United States.

3. Pursuant to that certain Early Transfer Cooperative Agreement ("ETCA") Covering Portions of the Hunters Point Naval Shipyard Between the United States of America Department of the Navy ("Navy") and the SFRA dated ____, and pursuant to that certain Remediation Agreement dated ____ between the SFRA and HPS Development Co., Respondents have agreed to undertake the cleanup of a portion of the former Hunter's Point Naval Shipyard, which ~~Site~~ is more specifically depicted in Appendix A to this Order. This cleanup is currently being undertaken by the U.S. Navy pursuant to the terms of the Hunter's Point Naval Shipyard Federal Facilities Agreement, dated January 22, 1992 ("FFA"). The FFA is being amended to provide in general that the obligations of the Navy to conduct that portion of the cleanup of the Site that SFRA has agreed to perform under the ETCA and this AOC will be suspended so long as the Respondents comply with all requirements of this Order and other conditions

described in the Amended FFA are met [NOTE: SUBJECT TO REVIEW AND CONSENT OF AMENDED FFA TERMS]. In the event that EPA, in consultation with DTSC and RWQCB, shall determine that the Respondents are in Default as defined in Section XXXII of this Order, the responsibility for any remaining response actions shall revert to the Navy and shall be undertaken by the Navy in accordance with the terms and conditions of the Amended FFA.

4. Respondents represent that they are each bona fide prospective purchasers ("BFPP") with respect to the Site as defined by section 101(40) of CERCLA, 42 U.S.C. § 9601(40), that it has and will continue to comply with section 101(40) during its ownership of the Site, and thus qualify for the protection from liability under CERCLA set forth in section 107(r)(1) of CERCLA, 42 U.S.C. § 9607(r)(1), with respect to the Site. In view, however, of the complex nature and significant extent of the Work to be performed by Respondents at the Site, and the risk of claims under CERCLA being asserted against Respondents notwithstanding section 107(r)(1) as a consequence of Respondents' activities at the Site pursuant to this Order, one of the purposes of this Order is to resolve, subject to the reservations and limitations contained in Section XXVI (Reservations of Rights by EPA), any potential liability of Respondents under CERCLA for Existing Contamination, as defined in Paragraph 13 below.

5. EPA, DTSC, RWQCB and Respondents recognize that this Order has been negotiated in good faith and that the actions undertaken by Respondents in accordance with this Order do not constitute an admission of any liability. Respondents do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Order, the validity of the Findings of Fact, and Conclusions of Law and Determinations in Sections V and VI of this Order. Respondents agree to comply with and be bound by the terms of this Order and further agree that they will not contest the basis or validity of this Order or its terms.

II. PARTIES BOUND

6. This Order applies to and is binding upon EPA, DTSC, RWQCB and upon Respondents and their successors and assigns. Any change in ownership or corporate status of Respondents including, but not limited to, any transfer of assets or real or personal property shall not alter Respondents' responsibilities under this Order, except as provided in Paragraph 20.

7. Each Respondent shall be responsible for carrying out the activities required of it by the Scope of Work and this Order in a timely manner and shall be subject to stipulated penalties for its failure to meet the terms and conditions of this Order. A Respondent may be held responsible for carrying out activities required of the other Respondent under the Scope of Work and this Order, but only after EPA, DTSC and RWQCB, have exhausted their remedies under this Order against the non-performing Respondent; provided that a Respondent shall respond immediately where EPA determines, in consultation with DTSC and RWQCB, that an immediate response

is required to protect human health and the environment. Where this Order specifies that Respondents have a right or duty, but does not specify which respondent has that right, the Respondents may designate a single Respondent to exercise that right or perform that duty.

8. Respondents shall ensure that their contractors, subcontractors, and representatives receive a copy of this Order and comply with this Order. Respondents shall be responsible for any noncompliance with this Order by their contractors, subcontractors and representatives.

9. The undersigned representatives of Respondents certify that they are fully authorized to enter into the terms and conditions of this Order and to execute and legally bind Respondents to this Order.

III. STATEMENT OF PURPOSE

10. In entering into this Order, the objectives of EPA, DTSC, RWQCB and Respondents, in addition to the purpose identified in Paragraph 4 above, are: (a) to provide for the design, construction and implementation of the selected remedial action consistent with CERCLA and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300 ("NCP"), including the obligation to implement and maintain institutional controls, including land use covenants, or operation and maintenance at the Site to achieve all applicable or relevant and appropriate requirements not waived ("ARARs"), and other Performance Standards described in the RODs; (b) to provide for the payment of response and oversight costs incurred by EPA, DTSC and RWQCB with respect to this Order, provided that neither EPA, DTSC, nor the RWQCB will seek reimbursement from Respondents for any response and oversight costs already paid to them from a Department of Defense funding source; and (c) to fulfill a portion of the required assurances under the CERCLA 120(h)(3)(C) covenant deferral process.

11. The Work conducted under this Order is subject to approval by EPA, after consultation with DTSC and RWQCB. For purposes of this Order, consultation with DTSC and RWQCB shall include, but not be limited to, simultaneous receipt by and a reasonable opportunity to review and comment on by DTSC and RWQCB of all documents and deliverables required to be submitted by Respondents under this Order (the reasonable review time for each document/deliverable will be determined by EPA in consultation with DTSC and the RWQCB before or upon receipt of the document/deliverable); opportunity to participate in all meetings among the Parties concerning the Site; and to participate in dispute resolution as provided by Sections XXII and XXIII of this Order. Respondents shall conduct all Work under this Order in compliance with CERCLA, the NCP, and all applicable EPA guidance, policies, and procedures and applicable State law.

IV. DEFINITIONS

12. Unless otherwise expressly provided herein, terms used in this Order which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Order or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

“Additional Insured Conditions” shall mean those environmental conditions at the Site that are not within the Insured Scope of Work but are otherwise within the insurance coverage grant of the Environmental Insurance Policies, to the extent, Respondents are paid by the insurer for such conditions or to the extent Respondents are not paid for such conditions due to the failure of the SFRA or named insured to comply with any Environmental Insurance requirements as set forth in the Environmental Insurance Policies.

NOTE: This new definition replaces the definition of “Insured Conditions” in our latest ETCA draft and is intended to be used in the ETCA as well as the AOC. We have tried to streamline the definition and remove the cumbersome concept of “Excluded Insured Conditions.” We have changed the name of the term) to try to make it more clear that the term refers to newly-discovered conditions covered under the PLL part of the insurance coverage, in addition to the conditions covered by the cost cap part of the insurance coverage (for which we use the defined term, “Insured Scope of Work”).

“Amended FFA” shall mean Amendment No. 1 to the Hunter’s Point Naval Shipyard Federal Facilities Agreement, dated _____.

“CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*

“Certification of Completion of Remedial Action” shall mean a certification issued for ROD Implementation Area (defined below) pursuant to ~~paragraph 63~~Paragraph 53c or a certification for the entire Site issued pursuant to ~~paragraph 63~~Paragraph 53d.

“Certification of Completion of the Work” shall mean a certification issued for ROD Implementation Area (defined below) pursuant to ~~paragraph 65~~Paragraph 55c or a certification for the entire Site issued pursuant to ~~paragraph 65~~Paragraph 55d.

“Covenant Deferral Request” shall mean the document prepared in accordance with CERCLA Section 120(h)(3)(C), which provides the basis for the deferral by EPA, with the concurrence of the State, of the CERCLA covenant with respect to the Site.

“Day” shall mean a calendar day unless expressly stated to be a working day. “Working day” shall mean a day other than a Saturday, Sunday, or State or Federal

holiday. In computing any period of time under this Order, where the last day would fall on a Saturday, Sunday, or State or Federal holiday, the period shall run until the close of business of the next working day.

“DTSC” shall mean the Department of Toxic Substances Control and any successor departments or agencies of the State.

“DTSC Future Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that DTSC incurs in reviewing or developing plans, reports and other items pursuant to this Order, verifying the Work, or otherwise implementing, or overseeing this Order including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, costs of participating in community relations meetings, legal or enforcement costs, costs to ~~or~~ implement institutional controls, costs for emergency response, or the costs incurred by DTSC in enforcing the terms of the Order, including all costs incurred in connection with Dispute Resolution pursuant to Sections XXII and XXIII in the Order.

“Effective Date” shall be the effective date of this Order as provided in Section XXXX.

“Environmental Insurance Policies” shall mean the environmental insurance policy(ies) issued and approved pursuant to Section XXXXX and meeting the requirements of Section XXXXX below and attached as Appendix 4.

“EPA” shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

“EPA Future Response Costs” shall mean all costs, not inconsistent with the NCP, including, but not limited to, direct and indirect costs, that the EPA incurs in reviewing or developing plans, reports and other items pursuant to this Order, verifying the Work, or otherwise implementing, overseeing, or enforcing this Order, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, costs of establishing and maintaining the administrative record, or participating in community relations meetings, costs for emergency response, or the costs incurred by EPA in enforcing the terms of the Order, including all costs incurred in connection with Dispute Resolution pursuant to Sections XXII and XXIII in the Order.

“ETCA” shall mean the Early Transfer Cooperative Agreement entered into by the Navy, the San Francisco Redevelopment Authority, San Francisco, California for the Site, dated _____, and attached hereto as Exhibit ____.

“Existing Contamination” shall mean:

- 1) any hazardous substances, pollutants or contaminants present or existing on or under the Site as of the Effective Date;
- 2) any hazardous substances, pollutants or contaminants that migrated from the Site prior to the Effective Date; and

Existing Contamination includes, but is not limited to, Navy-Retained Conditions.

“FFA” shall mean the Hunter’s Point Naval Shipyard Federal Facilities Agreement, dated January 22, 1992.

~~“Health and Safety Plan” shall mean _____.~~

“Hunter’s Point Special Account” shall mean the special account established at the Site by EPA pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. § 9622(b)(3).

“Institutional Controls” shall mean non-engineered instruments, such as administrative and/or legal controls, that help to minimize the potential for human exposure to contamination and/or protect the integrity of a remedy by limiting land and/or resource use. Examples of institutional controls include easements and covenants, zoning restrictions, special building permit requirements, and well drilling prohibitions.

~~“Insured Unknown Conditions~~Scope of Work~~” shall mean those activities necessary to address environmental conditions at the Site that are not Known Conditions and that are within the insurance coverage grant of, and for which, and to the extent, Respondents are paid pursuant to, the cost overrun insurance component of the Environmental Insurance Policies. This term also includes a specific Unknown Condition that otherwise would have been an Insured Unknown Condition but for which coverage was denied by the insurance provider solely due to the failure of the SFRA or named insured to comply with any Environmental Insurance requirements as set forth in the Environmental Insurance Policies. (“Excluded Insured Unknown Condition”). The term “Insured Unknown Conditions” shall include Excluded Unknown Insured Conditions only to the extent of specific costs that would have otherwise been funded by, and includes such activities even after the expiration of the term of, or exhaustion of the limits of, the cost overrun insurance component of the Environmental Insurance Policies but for such failure of the SFRA or the named insured, except to the extent such activities are Navy-Retained Conditions.~~

“Interest” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

~~“Known Conditions” shall mean those environmental conditions at the Site set forth in Appendix D (Known Conditions Documentation) and includes a contaminant at a site that is, based upon the state of scientific knowledge at the time this Agreement is executed, a scientifically accepted “break down” or “daughter” or “parent” of a contaminant identified in Appendix D as being present at that respective site. Notwithstanding any environmental conditions set forth in Appendix 3, or associated “break down,” “daughter,” or “parent” product, in no event shall the term “Known~~

~~Conditions” include “Navy Retained Conditions” as defined below. [APPENDIX D
SUBJECT TO FINAL REVIEW AND APPROVAL]~~

_____.
“National Contingency Plan” or “NCP” shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

“Navy-Retained Conditions” means any condition or cost associated with Unexploded Ordnance; Military Munitions; chemical, radiological or biological warfare agents; Radiological Materials; and Uninsured-~~Unknown~~ Conditions. The term shall also include (i) the performance of CERCLA five-year reviews for years 2013, 2018, 2023 and 2028 for remedies selected in a CERCLA ROD issued by the Navy, (ii) any other activity identified as the responsibility of the Navy in the Amended FFA, and (iii) any change to the ~~requirements in the CERCLA RODs, PCAP, or AOC set forth in an Explanation of Significant Differences under CERCLA or a ROD amendment or a PCAP amendment (or any other change required by the Regulatory Agencies to the requirements in the CERCLA RODs, PCAP or AOC), to the extent the costs associated with such change are not covered by the Insurance Policies or are not~~CERCLA RODs or the Remedial Designs, except:

a. to the extent covered by insurance, or

b. proposed by Respondents in order to allow for a reuse different than the reuse contemplated by the RODs or Remedial Designs being changed;

b. attributable to the negligence or omission of Respondents; to the extent such changes are the result of negligent acts or omissions of the Navy or parties acting on behalf of the Navy, such costs are Navy Retained Conditions even if covered by the Insurance Policies; to the extent such changes are the result of negligent acts or omissions by the City or parties acting on behalf of the City, such costs are not Navy Retained Conditions, even if they are not covered by the Insurance Policies.misconduct of Respondents

NOTE: Differences between this definition and the one in our ETCA draft are intended to be made also in the ETCA draft.

“Operation and Maintenance” or “O & M” shall mean all activities required to maintain the effectiveness of the Remedial Action(s) as required by EPA, in consultation with DTSC and RWQCB, pursuant to this Order subsequent to and a condition of Completion of Remedial Action.

“Order” shall mean this Administrative Order on Consent, the SOW, all appendices attached hereto (listed in Section XXXVI) and all documents incorporated by reference into this document, including without limitation EPA-approved submissions. EPA-approved submissions (other than progress reports) are incorporated into and become a part of the Order upon approval by EPA. In the event of conflict between this Order and any appendix or other incorporated documents, this Order shall control.

“Paragraph” shall mean a portion of this Order identified by an Arabic numeral or an upper case letter.

“Parties” shall mean EPA, DTSC, RWQCB and Respondents.

“Performance Standards” shall mean the remedial action objectives set forth in the ROD(s) for Parcel B and Parcel G.

~~“Petroleum Corrective Action Plan” or “PCAP” shall mean that certain Petroleum Corrective Action Plan for Parcel B issued by the RWQCB and dated ____.~~
~~[NOTE: Is it correct that there is no PCAP for Parcel G?] The term “Petroleum Corrective Action Plan” or “PCAP” shall not include any amendment, modification or supplement to the above referenced Petroleum Corrective Action Plan except to the extent required as the result of any negligent act or omission of Respondents or their contractors.~~

“Risk Management Plans” or RMPs” shall mean that certain Pre-RACR Risk Management Plan dated ____, and that certain Post-RACR Risk Management Plan dated ____, and any subsequent amendments thereto.

“RCRA” shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 *et seq.* (also known as the Resource Conservation and Recovery Act).

“Record of Decision(s)” or “ROD(s)” shall mean that certain CERCLA Amended Record of Decision for Parcel B dated ____ and that certain CERCLA Record of Decision for Parcel G dated ____, including all attachments thereto. ~~The term “Record of Decision(s)” or “ROD(s)” shall not include any amendment, modification or supplement to the above referenced Records of Decision except to the extent required as the result of any negligent act or omission of Respondents or their contractors. [If not attributable to Respondents’ negligence or omission, this would be Navy Retained.]~~

“Remedial Action” shall mean those activities, except for Operation and Maintenance, to be undertaken by the Respondents to implement each of the RODs in accordance with the SOW and the ~~final~~ Remedial Design and Remedial Action Work Plans and other plans approved by EPA, after consultation with DTSC and RWQCB.

“Remedial Action Work Plan” shall mean the document(s) developed pursuant to Paragraph ~~29~~22 of this Order and approved or modified by EPA, after consultation with DTSC and RWQCB, and any amendments thereto.

“Remedial ~~Design~~Designs” shall mean ~~those activities to be undertaken by the Respondents to develop the final plans and specifications for the Remedial Action(s) pursuant to the Remedial Design Work Plan(s).~~that certain Remedial Design for Parcel B dated ____ and that certain Remedial Design for Parcel G dated _____. “Remedial Design Work Plan” shall mean the document(s) developed pursuant to Paragraph ~~28~~21 of this Order and approved or modified by EPA, after consultation with DTSC and RWQCB, and any amendments thereto.

“ROD Implementation Area” shall mean the portions of Parcels B and G identified in Exhibit ____, attached hereto, as that Exhibit may be amended from time to

time with the approval of EPA, in consultation with DTSC and the RWQCB, which form the geographic units for which Respondents will seek certification of completion pursuant to Section XVII.

“RWQCB” shall mean the Regional Water Quality Control Board, San Francisco Bay Region, and any successor agencies of the State.

“RWQCB Future Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the RWQCB incurs in reviewing or developing plans, reports and other items pursuant to this Order, verifying the Work, or otherwise implementing, or overseeing this Order including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, costs of participating in community relations meetings, legal or enforcement costs, costs to establish or implement institutional controls, costs for emergency response, or the costs incurred by the RWQCB in enforcing the terms of the Order, including all costs incurred in connection with Dispute Resolution pursuant to Sections XXII and XXIII in the Order.

“Section” shall mean a portion of this Order identified by a Roman numeral.

“Site” shall mean that portion of the Hunter’s Point Naval Shipyard Superfund Site which Respondents have agreed to remediate in accordance with this Order, encompassing approximately ____ acres, described in Appendix A and depicted generally on the map attached as Appendix B. It is the intent of the Parties that the scope of the “Site” shall be the same as the “Area Covered by Environmental Services” as that term is defined in the ETCA.

“State” shall mean the State of California.

“State Interest” shall mean the interest rate applied to outstanding payments for costs billed pursuant to California Health and Safety Code section 25360.1. The rate of interest is subject to change.

“Statement of Work” or “SOW” shall mean the statement of work required of each Respondent for implementation of one or more Remedial Design(s) and Remedial Action(s) ~~and the PCAP~~ for the Site, as set forth in Appendix C to this Order and any modifications made in accordance with this Order. The Statement of Work shall identify, for each element of Work, which Respondent is responsible for performing that element.

“Supervising Contractor” shall mean the principal contractor retained by the Respondents to supervise and direct the implementation of the Work under this Order.

“Uninsured Condition(s)” shall mean those environmental conditions that are not within the Insured Scope of Work, and are not “Additional Insured Conditions”.
NOTE: Again, this updated definition is intended to replace the one in our ETCA draft.

“United States” shall mean the United States of America.

“Waste Material” shall mean (1) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33), 42 U.S.C. § 9601(33); (3) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); (4) any “hazardous waste” under California Health and Safety Code section 25117, or “hazardous substance” under California Health and Safety Code section 25316; and (5) any “waste” under California Water Code section 13050.

“Work” shall mean the activities with respect and limited to ~~Known~~ ~~Conditions~~the Insured Scope of Work and ~~Unknown~~Additoinal Insured Conditions that each Respondent is required to perform under this Order, except (1) those required by Section XXXIV (Retention of Records), (2) those aspects of a remedy which, after installation and implementation, require only periodic monitoring, inspection, enforcement, maintenance and repair, and (3) such further response actions selected pursuant to paragraph ~~37~~29, except to the extent necessitated by the acts or omissions of Respondents.

V. FINDINGS OF FACT

13. Hazardous substances that have been released or that have the potential to be released within the Site include, but may not be limited to _____ which currently pose potential long-term risks to human health or the environment.

On January 22, 1992, the EPA, State of California Department of Health Services (“DHS”) (now DTSC), and the Navy entered into a Federal Facilities Agreement requiring the Navy to identify, perform and complete all necessary response actions, including operation and maintenance at the former Hunter’s Point Naval shipyard under CERCLA.

The Site contains ____known Installation Restoration Program sites (“IRP sites”). The Navy has signed a Record of Decision and an Amended Record of Decision to select a remedy for the IRP sites.

The former Hunter’s Point Naval Shipyard was selected in 1992 for Base Realignment and Closure and was officially closed in _____.

The SFRA has requested an early transfer of the Site, which it has or will acquire, upon EPA’s approval of and the State’s concurrence on the Covenant Deferral Request. ~~Except for the remediation of areas containing only petroleum constituents,~~ ~~all~~All of the response actions undertaken by Respondents shall be performed under this AOC, as determined by EPA, with DTSC and RWQCB concurrence, pursuant to CERCLA and the NCP.

VI. CONCLUSIONS OF LAW AND DETERMINATIONS

14. Based on the Findings of Fact set forth above, and the Administrative Record supporting this Order, EPA has determined that:

a. The former Hunter's Point Naval Shipyard is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

b. The contamination found at the Site, as identified in the Findings of Fact above, includes "hazardous substances" as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), and Waste Materials as defined in Section IV of this Order.

c. Respondents are each "persons" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

d. The conditions described in Paragraph ~~14~~13 above constitute an actual or threatened release of a hazardous substance from the facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), or a release of Waste Material, as defined in Section IV of this Order.

e. The response actions required by this Order are necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Order, will be considered consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

VII. ADMINISTRATIVE ORDER

15. Based upon the foregoing Findings of Fact and Conclusions of Law and Determinations, it is hereby Ordered and Agreed that Respondents shall comply with the provisions of this Order, including, but not limited to, all appendices to this Order and all documents incorporated by reference into this Order.

VIII. GENERAL PROVISIONS

16. Commitments by Respondents.

Respondents shall finance, through the grant funds provided by the Navy pursuant to the ETCA and any proceeds from the Environmental Insurance Policies, and shall perform the Work in accordance with this Order, the SOW, the Records of Decision, ~~the PCAP~~ and other decision documents applicable to the Site and associated with the Records of Decision, and all work plans and other plans, standards, specifications, and schedules set forth herein or developed by Respondents and approved by EPA, in consultation with DTSC and RWQCB, pursuant to this Order. Respondents

shall also reimburse EPA, DTSC and RWQCB for their respective Future Response Costs as provided in this Order.

17. Compliance with Applicable Law.

All activities undertaken by the Respondents pursuant to this Order shall be performed in accordance with the requirements of all applicable federal and state laws and regulations. Respondents must also comply with all applicable or relevant and appropriate requirements of federal and state environmental laws as set forth in the ROD(s) and the SOW. The activities conducted pursuant to this Order, if approved by EPA, shall be considered to be consistent with the NCP.

18. Permits.

a. As provided in Section 121(e) of CERCLA and Section 300.400(e) of the NCP, no permit shall be required for any portion of the Work conducted entirely on-Site (i.e., within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work) and where such remedial action is selected and carried out in compliance with Section 121 of CERCLA. Where any portion of the Work that is not on Site requires a federal or state permit or approval, Respondents shall submit timely and complete applications and take all other actions necessary to obtain all such permits and approvals.

b. The Respondents may seek relief under the provisions of Section XXI (Force Majeure) of this Order for any delay in the performance of the Work resulting from a failure to obtain, or delay in obtaining, any permit required for the Work.

c. This Order is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

19. Conveyance of Site.

a. At least 30 days prior to the conveyance of any interest in property located within the Site including, but not limited to, fee interests and leasehold interests (in excess of 20 years) Respondents shall give written notice to EPA, DTSC, and RWQCB of the proposed conveyance, including the name and address of the grantee. Nothing in this Order shall be construed to require Respondents to secure the approval of EPA, DTSC, or RWQCB before transferring such interest.

b. In the event of any such conveyance, Respondent's obligations under this Order, shall continue to be met by Respondents except obligations to implement institutional controls pursuant to Section XII (Access and Institutional Controls) of this Order; if the responsibility for implementing such institutional controls has been transferred to the subsequent owner in an agreement legally enforceable by Respondents, and ~~this Order, shall continue to be met by Respondents~~ except as otherwise provided herein. ~~In no event shall the~~ Such conveyance shall not otherwise release or otherwise affect the liability of Respondents to comply with all provisions of this Order, absent the prior written consent of EPA, DTSC, and RWQCB. ~~EPA's,~~

~~DTSC's, and RWQCB's decisions under Paragraph 20.b. are in their sole discretion and shall not be subject to dispute resolution or judicial review.~~ EPA will consider the following criteria, among others, in approving or disapproving a proposed successor for the Work under this Order: (i) the technical qualifications of the successor, or its proposed consultant, to perform remaining Work obligations; (ii) financial ability to perform such obligations; (iii) the successor's legal status and legal authority to sign the Order; (iv) the proposed successor's willingness to sign the Order without modification; and (v) assurance that the proposed transfer of Work obligations will not hinder or delay completion of the Work. If EPA, DTSC, and RWQCB approve a successor for the Work under this Order, EPA, DTSC, and RWQCB may also provide covenants not to sue for the successor similar to those provided in Paragraphs 9587 and 9890 of this Order.

IX. PERFORMANCE OF THE WORK BY RESPONDENTS

20. Selection of Supervising Contractor.

a. All aspects of the Work to be performed by the Respondents pursuant to Sections IX (Performance of the Work by Respondents), X (Remedy Review), XI (Quality Assurance, Sampling and Data Analysis), and XVIII (Emergency Response) of this Order shall be under the direction and supervision of the Supervising Contractor, the selection of which shall be subject to disapproval by EPA, after consultation with DTSC and RWQCB. Respondent CP/HPS Development Co. ~~{who is this?}~~ has proposed to use MACTEC as its Supervising Contractor and provided EPA, DTSC and RWQCB with the information meeting the criteria described in subparagraph b. below, including its qualifications and Quality Management Plans. [NOTE: Subject to such information being provided and reviewed] MACTEC is not disapproved.

b. If at any time in the future, Respondents propose to change its Supervising Contractor, Respondents shall notify EPA, DTSC and RWQCB in writing at least sixty (60) days in advance of such change, and must obtain an authorization to proceed from EPA, after consultation with DTSC and RWQCB, before the new Supervising Contractor performs, directs, or supervises any Work under this Order. Respondents must provide the name, title, and qualifications of any contractor proposed to be Supervising Contractor. With respect to any contractor proposed to be Supervising Contractor, Respondents shall demonstrate that the proposed contractor has a quality system that complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995), by submitting a copy of the proposed contractor's Quality Management Plan (QMP). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/241/B-01/002, March 2001) or equivalent documentation as determined by EPA. EPA, after consultation with DTSC and RWQCB, will issue a notice of disapproval or an authorization to proceed.

c. If EPA disapproves a proposed Supervising Contractor, EPA will notify Respondents in writing. Respondents shall submit to EPA, DTSC and RWQCB a list of contractors, including the qualifications of each contractor that would be acceptable to them, within 30 days of receipt of EPA's disapproval of the contractor previously proposed. After consultation with DTSC and RWQCB, EPA will provide written notice of the names of any contractor(s) that it disapproves and an authorization to proceed with respect to any of the other contractors. Respondents may select any contractor from that list that is not disapproved and shall notify EPA, DTSC and RWQCB of the name of the contractor selected within 21 days of EPA's authorization to proceed.

d. If EPA fails to provide written notice of its authorization to proceed or disapproval as provided in this Paragraph and this failure prevents Respondents from meeting one or more deadlines in a plan approved by the EPA pursuant to this Order, Respondents may seek relief under the provisions of Section XXI (Force Majeure).

21. Remedial Design. ~~With respect to each remedial design, the following procedures and requirements shall apply. [NOTE: TIMELINES SUBJECT TO FURTHER REVIEW]. [NOTE: The deletions in this section are only intended to reflect the new understanding that there will be an approved Remedial Design prior to the AOC becoming effective. Please let us know if we have deleted more or less than necessary to accomplish that objective.]~~

~~a. With respect to the Records of Decision, within 21 days of the Effective Date of this Order, Respondents shall provide EPA, DTSC and RWQCB with a schedule for the remedial design ("RD") and performance of the Remedial Action ("RA") to implement the Records of Decision. If EPA, after consultation with DTSC and RWQCB, does not approve the schedule, Respondents shall be so advised and Respondents shall either revise the schedule or invoke the dispute resolution provisions of Section XXIII with respect to the schedule only, not the remedy selected.~~

~~b. The Remedial Design Work Plan shall include plans and schedules for implementation of all remedial design and pre-design tasks identified in the SOW, including, but not limited to, plans and schedules for the completion of: (1) design sampling and analysis plan (including, but not limited to, a Remedial Design Quality Assurance Project Plan ("RD-QAPP") in accordance with Section XI (Quality Assurance, Sampling and Data Analysis)); (2) a Construction Quality Assurance Plan; (3) a treatability study; (4) a Pre-design Work Plan; (5) a preliminary design submittal; (6) an intermediate design submittal; (7) a pre-final/final design submittal; and (8) other plans as described in the SOW including a Health and Safety Plan which conforms to the applicable Occupational Safety and Health Administration and EPA requirements including, but not limited to, 29 C.F.R. § 1910.120. In addition, the Remedial Design Work Plan shall include a schedule for completion of the Remedial Action Work Plan.~~

~~e.~~ a. Upon approval of the Remedial Design Work Plan by EPA, after consultation with DTSC and RWQCB, and submittal of the Health and Safety Plan Pre and Post-RACR RMP for all field activities to EPA,

DTSC and RWQCB, Respondents shall implement the Remedial Design Work Plan. The Respondents shall submit to EPA, DTSC and RWQCB all plans, submittals and other deliverables required under the approved Remedial Design Work Plan in accordance with the approved schedule for review and approval pursuant to Section XIV (EPA Approval of Plans and Other Submissions). Unless otherwise directed by EPA, Respondents shall not commence further Remedial Design activities at the Site prior to approval of the Remedial Design Work Plan.b.

~~d. The preliminary design submittal shall include, at a minimum, the following: (1) design criteria; (2) results of treatability studies; (3) results of additional field sampling and pre-design work; (4) project delivery strategy; (5) preliminary plans, drawings and sketches; (6) required specifications in outline form; and (7) preliminary construction schedule.~~

~~e. The intermediate design submittal, if required by EPA or if independently submitted by the Respondents, shall be a continuation and expansion of the preliminary design. Any value engineering proposals must be identified and evaluated during this review.~~

~~f. The pre-final/final design submittal shall include, at a minimum, the following: (1) final plans and specifications; (2) Operation and Maintenance Plan; (3) Construction Quality Assurance Project Plan ("CQAPP"); (4) Field Sampling Plan (directed at measuring progress towards meeting Performance Standards); and (5) Contingency Plan. The CQAPP, which shall detail the approach to quality assurance during construction activities at the Site, shall specify a quality assurance official ("QA Official"), independent of the Supervising Contractor, to conduct a quality assurance program during the construction phase of the project.~~

~~g. Respondents may request EPA approval that the Remedial Design Work Plan and Remedial Action Work Plan be combined. Any combined Work Plan shall include all information described in Paragraphs 28 and 29 of this Section unless omissions are approved by EPA after consultation with DTSC and RWQCB.~~

~~h. Within 60~~Within days of the Effective Date of this Order ~~or EPA's signature of any ROD for the Site, whichever is later,~~ Respondents shall submit an Institutional Controls Implementation and Assurance Plan applicable to the ROD to EPA for review and approval, after consultation with DTSC and RWQCB, in accordance with the SOW.

22. Remedial Action. With respect to each remedial action, the following procedures and requirements shall apply:

a. Within ~~60~~60 days ~~after the approval of the final design submittal, of the Effective Date of this Order~~ Respondents shall submit to EPA, DTSC and RWQCB a work plan for the performance of the Remedial Action at the Site ("Remedial Action Work Plan"). The Remedial Action Work Plan shall provide for

construction and implementation of the remedy set forth in the relevant ROD and achievement of the Performance Standards, in accordance with the ROD, this Order, the SOW, and the design plans and specifications developed in accordance with the Remedial Design Work Plan and approved by EPA after consultation with DTSC and RWQCB. Upon its approval by EPA, the Remedial Action Work Plan shall be incorporated into and become enforceable under this Order. At the same time as the Remedial Action Work Plan is submitted, Respondents shall submit to EPA, DTSC and RWQCB a Health and Safety Plan for field activities required by the Remedial Action Work Plan which conforms to the applicable Occupational Safety and Health Administration and EPA requirements, including but not limited to, 29 C.F.R. § 1910.120.

b. The Remedial Action Work Plan shall include the following: (1) schedule for completion of the Remedial Action, which among other things shall provide for the complete initial installation of surface cover for all portions of the Site for which the RODs require a surface cover remedy no later than seven years after the Effective Date of this Order; (2) schedule for developing and submitting other required Remedial Action plans; (3) methods for satisfying permitting requirements; (4) methodology for implementation of the Operation and Maintenance Plan; (5) methodology for implementation of the Contingency Plan; (6) tentative formulation of the Remedial Action team; (7) construction quality control plan (by constructor); and (8) procedures and plans for the decontamination of equipment and the disposal of contaminated materials. The Remedial Action Work Plan also shall include the methodology for implementation of the Construction Quality Assurance Plan and a schedule for implementation of all Remedial Action tasks identified in the final design submittal and shall identify the initial formulation of the Respondents' Remedial Action Project Team (including, but not limited to, the Supervising Contractor). ~~TO BE FURTHER REVIEWED~~

c. Upon approval of the Remedial Action Work Plan by EPA, after consultation with DTSC and RWQCB, Respondents shall implement the activities required under the Remedial Action Work Plan. The Respondents shall submit to EPA, DTSC and RWQCB all plans, submittals, or other deliverables required under the approved Remedial Action Work Plan in accordance with the approved schedule for review and approval pursuant to Section XIV (EPA Approval of Plans and Other Submissions). Unless otherwise directed by EPA, Respondents shall not commence physical Remedial Action activities at the Site prior to approval of the Remedial Action Work Plan.

23. The Respondents shall continue to implement the Remedial Action and Operation and Maintenance until the Performance Standards are achieved and for so long thereafter as is otherwise required under this Order and the ROD.

24. Respondents acknowledge and agree that nothing in this Order, the SOW, or the Remedial Design or Remedial Action Work Plans constitutes a warranty or representation of any kind by EPA, DTSC or RWQCB that compliance with the work

requirements set forth in the SOW and the Work Plans will achieve the Performance Standards.

~~[25.—Certain areas of the Site contain petroleum constituents, but no hazardous substances, pollutants, or contaminants have been identified. The Parties agree that CERCLA does not apply to [If CERCLA does not apply, should the PCAP work be performed pursuant to this Order?] and that this site will be remediated in compliance the PCAP. If EPA determines that any other discrete area of the Site, which has been determined to contain petroleum constituents, does not contain hazardous substances, pollutants, or contaminants, EPA will notify the RWQCB and DTSC. The RWQCB may require Respondents to investigate, cleanup, or abate such discharges of petroleum under a separate agreement or order between the RWQCB and Respondents.]~~

25. ~~26.~~ Respondents are not required to perform any Work under this Order on any property that is outside the boundaries of the Site.

26. ~~27.~~ Waste Shipments.

a. For any Work performed under this Order, Respondents shall comply with all applicable State waste management laws.

b. For any Work performed under this Order, Respondents shall, prior to any shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving facility's state and to the EPA, DTSC and RWQCB Project Coordinators of such shipment of Waste Material. However, this notification requirement shall not apply to any off-site shipments to out-of-state waste management facilities when the total volume of all such shipments will not exceed 10 cubic yards.

c. The Respondents shall include in the written notification for out-of-state waste shipments the following information, where available: (1) the name and location of the facility to which the Waste Material is to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. The Respondents shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

d. The identity of the receiving facility and state will be determined by the Respondents following the award of the contract for Removal Action or Remedial Action construction. The Respondents shall provide the information required by Paragraph ~~32.~~22.c. as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

27. ~~28.~~ Off-Site Waste Shipments. Before shipping any hazardous substances, pollutants, or contaminants from the Site to an off-Site location, Respondents shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3) and 40 C.F.R. 300.440. If the off-

Site location is in California, Respondents shall obtain certification from the State that the proposed receiving facility is in substantial compliance with California laws. Respondents shall only send hazardous substances, pollutants, or contaminants from the Site to an off-Site facility that complies with the requirements of the statutory provisions and regulations cited in the preceding sentences.

X. REMEDY REVIEW

28. ~~29.~~ Periodic Review.

For the duration of this Order, Respondents shall conduct any studies and investigations as requested by EPA, after consultation with DTSC and RWQCB, in order to permit EPA and/or the Navy to conduct reviews of whether any Remedial Action(s) is(are) protective of human health and the environment at least every five years as required by Section 121(c) of CERCLA and any applicable regulations.

29. ~~30.~~ Selection of Further Response Actions.

If EPA determines, at any time, after consultation with DTSC and RWQCB, that any Remedial Action at the Site is not protective of human health and the environment, EPA, with the Navy's concurrence, may select further response actions for the Site in accordance with the requirements of CERCLA and the NCP ("Further Response Actions"). [~~What is the consequence if Navy does not concur?~~ Need consensus between the EPA & the Navy as to who is the United States for further response actions.]

a. Opportunity to Comment. For the duration of this Order, Respondents and, if required by Sections 113(k)(2) or 117 of CERCLA, the public, will be provided with an opportunity to comment on any further response actions proposed by EPA and to submit written comments for the record during the comment period.

b. Limitations on Respondents' Obligation to Perform Further Response Actions. If EPA selects Further Response Actions for the Site, the Respondents shall have no obligation to undertake such Further Response Actions except to the extent that such Actions are required as a direct result of Respondents' negligent act or omission, and in no event shall Respondents be obligated to perform to the extent that such Actions are required as a result of Navy-Retained Conditions. Any requirement that Respondents undertake Further Response Actions shall be subject to Respondents' right to dispute resolution in accordance with Section XXIII. Disputes pertaining to whether any Remedial Action is protective or to EPA's selection of further response actions shall be resolved based on the administrative record supporting the decision.

c. Submissions of Plans. If Respondents are required to perform further response actions pursuant to Paragraph ~~37.29~~b., Respondents shall submit a plan for such work to EPA for approval, in accordance with the procedures set forth in Section IX (Performance of the Work by Respondents) and shall implement the plan approved by EPA, after consultation with DTSC and RWQCB, in accordance with the provisions of this Order.

XI. QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS

30. ~~31.~~ Respondents shall use quality assurance, quality control, and chain of custody procedures for all assessment, characterization, treatability, design, compliance and monitoring samples in accordance with “Uniform Federal Policy for Quality Assurance Project Plans (UFP-QAPP) (EPA/505/B-04-900A, March 2005), “EPA Requirements for Quality Assurance Project Plans (QA/R5)” (EPA/240/B-01/003, March 2001) “Guidance for Quality Assurance Project Plans (QA/G-5)” (EPA/600/R-98/018, February 1998), and subsequent amendments to such guidelines upon notification by EPA to Respondents of such amendment. Amended guidelines shall apply only to procedures conducted after such notification. Prior to the commencement of any monitoring project under this Order, Respondents shall submit to EPA for approval, a Quality Assurance Project Plan (“QAPP”) that is consistent with the SOW, the NCP and relevant guidance. If relevant to the proceeding, the Parties agree that validated sampling data generated in accordance with the QAPP(s) and reviewed and approved by EPA shall be admissible as evidence, without objection, in any proceeding under this Order. Respondents shall ensure that EPA, DTSC and RWQCB personnel and their authorized representatives are allowed access at reasonable times to all laboratories utilized by Respondents in implementing this Order. In addition, Respondents shall ensure that such laboratories shall analyze all samples submitted by EPA, DTSC or RWQCB pursuant to the QAPP for quality assurance monitoring. Respondents shall ensure that the laboratories it utilizes for the analysis of samples taken pursuant to this Order perform all analyses according to accepted EPA methods. Accepted EPA methods consist of those methods which are documented in the “Contract Lab Program Statement of Work for Inorganic Analysis” and the “Contract Lab Program Statement of Work for Organic Analysis,” dated February 1988 (collectively, “CLP-approved methods”), and any amendments made thereto during the course of the implementation of this Order; however, upon approval by EPA, after consultation with DTSC and RWQCB, the Respondents may use other analytical methods which are as stringent as or more stringent than the CLP- approved methods. Respondents shall ensure that all laboratories it uses for analysis of samples taken pursuant to this Order participate in an EPA or EPA-equivalent QA/QC program. Respondents shall only use laboratories that have a documented Quality System which complies with ANSI/ASQC E4-1994, “Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs,” (American National Standard, January 5, 1995), and AEPA Requirements for Quality Management Plans (QA/R-2),” (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by EPA after consultation with DTSC and RWQCB. EPA

may consider laboratories accredited under the National Environmental Laboratory Accreditation Program (NELAP) as meeting the Quality System requirements. Respondents shall ensure that all field methodologies utilized in collecting samples for subsequent analysis pursuant to this Order will be conducted in accordance with the procedures set forth in the QAPP approved by EPA.

31. ~~32.~~ Upon request, the Respondents shall allow split or duplicate samples to be taken by EPA, DTSC or RWQCB or their authorized representatives. Respondents shall notify EPA, DTSC and RWQCB not less than 28 days in advance of any sample collection activity unless shorter notice is agreed to by EPA, after consultation with DTSC and RWQCB. In addition, EPA, DTSC and RWQCB shall have the right to take any additional samples that they deem necessary. Upon request, EPA shall allow the Respondents to take split or duplicate samples of any samples it takes as part of the EPA's oversight of the Respondents' implementation of the Work.~~‡~~

32. ~~33.~~ Respondents shall submit to EPA, DTSC and RWQCB two copies of the results of all sampling and/or tests or other data obtained or generated by or on behalf of Respondents with respect to the Site and/or the implementation of this Order unless EPA agrees otherwise, after consultation with DTSC and RWQCB.

33. ~~34.~~ Notwithstanding any provision of this Order, the United States and the State, including DTSC and RWQCB, hereby retain all of their information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA and any other applicable statutes or regulations.

XII. ACCESS AND INSTITUTIONAL CONTROLS

34. ~~35.~~ As required in the covenant deferral process, certain restrictions on land/soil and groundwater use are needed to assure protection of human health and the environment at the time of transfer of the Site, and prior to and during the implementation of response actions at the Site. Accordingly, the Navy, EPA, DTSC and RWQCB have prepared, in consultation with Respondents, land use covenants ("LUCs") consistent with the requirements of the RODs for Parcels B and G. Respondents shall refrain from using the Site in any manner that would interfere with or adversely affect the implementation, integrity, or protectiveness of remedial measures and response actions to be performed pursuant to this Order and/or in accordance with the RODs.

a. Respondents shall comply with the ~~use restrictions selected in the RODs and shall comply with the restrictions found in Appendix G prior to implementation of the RODs~~ restrictions set forth in the LUCs, except to the extent Respondents obtain the approval of the Navy, EPA, DTSC and RWQCB to allow an otherwise restricted use or activity pursuant to the approval procedures set forth in the LUCs. [NOTE: What is Appendix G?]

35. ~~36.~~ As of the Effective Date of this Order, if the Site is owned or controlled by Respondents, Respondents shall: provide the United States, including EPA and the Navy, and DTSC and RWQCB, and their representatives and contractors, with access at all reasonable times to the Site, for the purpose of conducting any activity related to this Order including, but not limited to, the following activities:

- (1) Monitoring the Work;
- (2) Verifying any data or information submitted to EPA, DTSC and RWQCB;
- (3) Conducting investigations relating to contamination at or near the Site;
- (4) Obtaining samples;
- (5) Assessing the need for planning or implementing response actions or additional response actions at or near the Site;
- (6) Assessing implementation of quality assurance and quality control practices as defined in the approved Quality Assurance Project Plans;
- (7) Implementing any response actions or the Work in the event of Default by Respondents;
- (8) Inspecting and copying records, operating logs, contracts or other documents maintained or generated by Respondents or its agents, consistent with Section XXXIII (Access to Information);
- (9) Assessing Respondents' compliance with this Order; and
- (10) Determining whether the Site is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted by, or pursuant to this Order.

36. ~~37.~~ If EPA determines, after consultation with DTSC and RWQCB, that land/water use restrictions in the form of state or local laws, regulations, ordinances or other governmental controls are needed to implement any remedies selected in the RODs, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Respondents shall cooperate with EPA's efforts to secure such governmental controls.

37. ~~38.~~ Notwithstanding any provision of this Order, the United States and the State, including DTSC and RWQCB, retain all of their access authorities and rights, as well as all of their rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA and any other applicable statutes or regulations.

XIII. REPORTING REQUIREMENTS

38. ~~39.~~ In addition to any other requirement of this Order, Respondents shall submit two copies of written monthly progress reports to EPA, DTSC and RWQCB that: (a) describe the actions which have been taken toward achieving compliance with this Order during the previous month; (b) include a summary of all results of sampling and tests and all other data received or generated by Respondents or their contractors or agents in the previous month; (c) identify all work plans, plans and other deliverables required by this Order completed and submitted during the previous month; (d) describe all actions, including, but not limited to, data collection and implementation of work plans, which are scheduled for the next six weeks and provide other information relating to the progress of construction, including, but not limited to, critical path diagrams, Gantt charts and Pert charts; (e) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Work, and a description of efforts made to mitigate those delays or anticipated delays; (f) include any modifications to the work plans or other schedules that Respondents has proposed to EPA or that have been approved by EPA; and (g) describe all activities undertaken in support of the Community Relations Plan during the previous month and those to be undertaken in the next six weeks. Respondents shall submit these progress reports to EPA, DTSC and RWQCB by the tenth day of every month following the Effective Date of this Order until EPA notifies the Respondents pursuant to Section XVII (Certification of Completion). If requested by EPA, DTSC or RWQCB, Respondents shall also provide briefings for EPA, DTSC and RWQCB to discuss the progress of the Work.

39. ~~40.~~ The Respondents shall notify EPA, DTSC and RWQCB of any change in the schedule described in the monthly progress report for the performance of any activity, including, but not limited to, data collection and implementation of work plans, no later than seven days prior to the performance of the activity.

40. ~~41.~~ Upon the occurrence of any event during performance of the Work that is required to be reported pursuant to Section 103 of CERCLA or Section 304 of the Emergency Planning and Community Right-to-know Act ("EPCRA"), the Respondent owning the property where the event occurred shall within 24 hours of the onset of such event orally notify the EPA, DTSC and RWQCB Project Coordinators or the Alternate EPA Project Coordinator (in the event of the unavailability of the EPA Project Coordinator), or, in the event that neither the EPA Project Coordinator or Alternate EPA Project Coordinator is available, the Emergency Response Section, Region 9, United States Environmental Protection Agency. These reporting requirements are in addition to the reporting required by CERCLA Section 103 or EPCRA Section 304.

41. ~~42.~~ Within 20 days of the onset of such an event, the Respondent owning the property where the event occurred shall furnish to EPA, DTSC and RWQCB a written report, signed by that Respondent's Project Coordinator, setting forth the events which occurred and the measures taken, and to be taken, in response thereto. Within 30 days of the conclusion of such an event, that Respondent shall submit a report setting forth all actions taken in response thereto.

42. ~~43.~~ Each Respondent shall submit two copies of all plans, reports, and data required by the SOW, each Remedial Design Work Plan, each Remedial Action Work Plan, or any other document which that respondent is required to submit under the Scope of Work to EPA in accordance with the schedules set forth in such plans. The submitting Respondent shall simultaneously submit two copies of all such plans, reports and data the Respondent is required to submit under the Scope of Work to DTSC and RWQCB. Upon request by EPA, DTSC or RWQCB, the submitting Respondents shall submit in electronic form all portions of any report or other deliverable Respondents are required to submit pursuant to the provisions of this Order.

43. ~~44.~~ All reports and other documents submitted by Respondents to EPA, DTSC and RWQCB (other than the monthly progress reports referred to above) which purport to document Respondents' compliance with the terms of this Order shall be signed by an authorized representative of the Respondents.

XIV. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

44. ~~45.~~ After review of any plan, report or other item which is required to be submitted for approval pursuant to this Order, EPA, after consultation with DTSC and RWQCB, shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that the submitting Respondent modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing the submitting Respondent at least one notice of deficiency and an opportunity to cure within thirty (30) days, except where to do so would cause serious disruption to the Work or where previous submission(s) have been disapproved due to material defects and the deficiencies in the submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

45. ~~46.~~ In the event of approval, approval upon specified conditions, or modification by EPA, pursuant to Paragraph ~~5444~~(a), (b), or (c), the submitting Respondent shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA subject only to Respondents' right to invoke the Dispute Resolution procedures set forth in Section XXIII (Dispute Resolution) with respect to the modifications or conditions made by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Paragraph ~~5444~~(c) and the submission has a material defect, EPA retains its right to seek stipulated penalties, as provided in Section XXIV (Stipulated Penalties).

46. 47. Resubmission of Plans.

a. Upon receipt of a notice of disapproval pursuant to Paragraph ~~5244~~(d), the submitting Respondent shall, within thirty (30) days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other item for approval. Any stipulated penalties applicable to the submission, as

provided in Section XXIV, shall accrue during the 30-day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraph ~~54.~~44.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph ~~54.~~44., the submitting Respondent shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve Respondents of any liability for stipulated penalties under Section XXIV (Stipulated Penalties).

47. ~~48.~~ In the event that a resubmitted plan, report or other item, or portion thereof, is disapproved by EPA, after consultation with DTSC and RWQCB, EPA may again require the submitting Respondent to correct the deficiencies, in accordance with the preceding Paragraphs. EPA also retains the right to modify or develop the plan, report or other item. The submitting Respondent shall implement any such plan, report, or item as modified or developed by EPA, subject only to its right to invoke the procedures set forth in Section XXIII (Dispute Resolution).

48. ~~49.~~ If upon resubmission, a plan, report, or item is disapproved or modified by EPA due to a material defect, the submitting Respondent shall be deemed to have failed to submit such plan, report, or item timely and adequately unless the submitting Respondent invokes the dispute resolution procedures set forth in Section XXIII (Dispute Resolution) and EPA's action is overturned pursuant to that Section. The provisions of Section XXIII (Dispute Resolution) and Section XXIV (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is upheld, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XXIV.

49. ~~50.~~ All plans, reports, and other items required to be submitted to EPA, DTSC and RWQCB under this Order shall, upon approval or modification by EPA, be enforceable under this Order. In the event EPA approves or modifies a portion of a plan, report, or other item required to be submitted to EPA under this Order, the approved or modified portion shall be enforceable under this Order.

XV. PROJECT COORDINATORS

50. ~~51.~~ Within 20 days of the Effective Date of this Order, each Respondent, DTSC, RWQCB and EPA will notify each other, in writing, of the name, address and telephone number of their respective designated Project Coordinators and Alternate Project Coordinators. If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor will be given to the other Parties at least 5 working days before the changes occur, unless impracticable, but in no event later than the actual day the change is made. The Respondents' Project Coordinators shall be subject to disapproval by EPA, in consultation with DTSC and RWQCB, and shall have the technical expertise sufficient to adequately oversee all aspects of the

Work. The Respondents' Project Coordinators shall not be attorneys for the Respondents in this matter. They may assign other representatives, including other contractors, to serve as a representative for oversight of performance of daily operations during remedial activities.

51. ~~52.~~ EPA, DTSC and RWQCB may designate other representatives, including, but not limited to EPA, DTSC and RWQCB employees, and federal and state contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Order. EPA's Project Coordinator and Alternate Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager (RPM) and an On-Scene Coordinator (OSC) by the National Contingency Plan, 40 C.F.R. Part 300. In addition, EPA's Project Coordinator or Alternate Project Coordinator shall have authority, consistent with the National Contingency Plan, to halt any Work required by this Order and to take any necessary response action when s/he determines that conditions at the Site constitute an emergency situation or may present an immediate threat to public health or welfare or the environment due to release or threatened release of Waste Material. EPA's Project Coordinator, DTSC's Project Coordinator, RWQCB's Project Coordinator and the Respondents' Project Coordinators will meet, at a minimum, on a monthly basis.

XVI. ASSURANCE OF ABILITY TO COMPLETE WORK

52. ~~53.~~ EPA, DTSC and RWQCB hereby acknowledge that the grant funds provided by the Navy pursuant to the ETCA and the Environmental Insurance Policies procured pursuant to the ETCA provide sufficient financial assurance of the Respondents' ability to complete the Work.

XVII. CERTIFICATION OF COMPLETION

~~[GENERAL NOTE: We need to discuss how RWQCB approval of PCAP completion fits into the certification of completion process.]~~

53. ~~54.~~ Completion of the Remedial Action. With respect to each ROD Implementation Area, the following procedures and requirements shall apply:

a. Within 90 days after Respondents conclude that the Remedial Action for a ROD Implementation Area has been fully performed, including recordation of a modification to the LUC(s), if required by EPA, and implementation of any other institutional controls called for in the ROD, and the Performance Standards have been attained, Respondents shall schedule and conduct a pre-certification inspection to be attended by Respondents, EPA, DTSC, RWQCB and the Supervising Contractor(s). If, after the pre-certification inspection, Respondents still believe that the Remedial Action has been fully performed and the Performance Standards have been attained, Respondents shall submit to EPA for approval a written report requesting certification,

with a copy to the DTSC and RWQCB, pursuant to Section XIV (EPA Approval of Plans and Other Submissions) within 30 days of the inspection. In the report, a professional engineer registered in the State and Respondents' Project Coordinator shall state that the Remedial Action for the ROD Implementation Area has been completed in full satisfaction of the requirements of this Order. The written report shall include as-built drawings signed and stamped by a professional engineer. The report shall contain the following statement, signed by a responsible official of Respondents or the Respondents' Project Coordinator:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

b. If, after completion of the pre-certification inspection and receipt and review of the written report, EPA, after consultation with DTSC and RWQCB, determines that the Remedial Action for the ROD Implementation Area or any portion thereof has not been completed in accordance with this Order or that the Performance Standards have not been achieved, EPA will notify Respondents in writing of the activities that must be undertaken by Respondents pursuant to this Order to complete the Remedial Action and achieve the Performance Standards, provided, however, that EPA may only require Respondents to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the scope of the remedy selected in the ROD. EPA will set forth in the notice a schedule for performance of such activities consistent with the Order and the SOW or require the Respondents to submit a schedule to EPA, DTSC and RWQCB for approval pursuant to Section XIV (EPA Approval of Plans and Other Submissions). Respondents shall perform all activities described in the notice in accordance with the specifications and schedules established pursuant to this Paragraph, subject to Respondents' right to invoke the dispute resolution procedures set forth in Section XXIII (Dispute Resolution).

c. If EPA concludes, based on the initial or any subsequent report requesting Certification of Completion of Remedial Action, and after consultation with DTSC and RWQCB, that the Remedial Action has been performed in accordance with this Order and that the Performance Standards have been achieved, EPA will so certify in writing to Respondents. This certification shall constitute a Certification of Completion of the Remedial Action for a ROD Implementation Area for purposes of this Order.

d. After EPA has issued a Certification of Completion of Remedial Action for each ROD Implementation Area within the Site, EPA shall certify in writing to Respondents that the Remedial Action for the entire Site has been performed in accordance with this Order and that the Performance Standards have been achieved for the entire Site. This certification shall constitute a Certification of Completion of Remedial Action for the Site.

54. ~~55.~~ NPL De-Listing.

After EPA has issued a Certification of Completion of Remedial Action for all of ROD Implementation Areas comprising Parcel G or for all of the ROD Implementation Areas comprising the portion of Parcel B within the Site, EPA shall initiate the regulatory proceedings necessary to effectuate a Partial Deletion from the National Priorities List of Parcel G or the portion of Parcel B within the Site from the Hunters Point Naval Shipyard Superfund Site.

55. ~~56.~~ Completion of the Work.

a. Within 90 days after Respondents conclude that all phases of the Work (including O & M for all Remedial Actions), have been fully performed for a ROD Implementation Area, Respondents shall schedule and conduct a pre-certification inspection to be attended by Respondents, EPA, DTSC and RWQCB. If, after the pre-certification inspection, the Respondents still believes that the Work has been fully performed for that ROD Implementation Area, Respondents shall submit a written report by a professional engineer registered in the State stating that the Work has been completed in full satisfaction of the requirements of this Order. The report shall contain the following statement, signed by a responsible corporate official of a Respondents or the Respondents' Project Coordinator:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

b. If, after review of the written report, EPA, after consultation with DTSC and RWQCB, determines that any portion of the Work has not been completed for the ROD Implementation Area in accordance with this Order, EPA will notify Respondents in writing of the activities that must be undertaken by Respondents pursuant to this Order to complete the Work, provided, however, that EPA may only require Respondents to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the scope of the remedy selected in the ROD. EPA will set forth in the notice a schedule for performance of such activities consistent with the Order and the SOW or require the Respondents to submit a schedule to EPA for approval pursuant to Section XIV (EPA Approval of Plans and Other Submissions). Respondents shall perform all activities described in the notice in accordance with the specifications and schedules established therein, subject to Respondents' right to invoke the dispute resolution procedures set forth in Section XXIII (Dispute Resolution).

c. If EPA concludes, based on the initial or any subsequent request for Certification of Completion of the Work for the ROD Implementation Area by Respondents, and after consultation with DTSC and RWQCB, that the Work in that ROD Implementation Area has been performed in accordance with this Order, EPA will so

notify the Respondents in writing. That written notification shall constitute the Certificate of Completion of the Work for the ROD Implementation Area.

d. After EPA has issued a Certification of Completion of the Work for each ROD Implementation Area within the Site, EPA shall certify in writing to Respondents that the Work for the entire Site has been performed in accordance with this Order. This certification shall constitute a Certification of Completion of the Work for the Site.

XVIII. EMERGENCY RESPONSE

56. ~~57.~~ In the event of any action or occurrence during the performance of the Work which causes or threatens a release of hazardous substances at the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, the Respondent that owns the property where the release has been caused or threatened shall, subject to Paragraph ~~67,~~57. immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall immediately notify EPA's, DTSC's and RWQCB's Project Coordinators. If EPA's Project Coordinator is unavailable, EPA's Alternate Project Coordinator must be notified. If neither of these EPA persons is available, that Respondent shall notify the EPA Emergency Response Unit, Region 9. That Respondent shall take such actions in consultation with EPA's Project Coordinator or other available authorized EPA officer and in accordance with all applicable provisions of the ~~Health~~Pre and ~~Safety Plans~~Post-RACR RMPs, the Contingency Plans, and any other applicable plans or documents developed pursuant to the SOW. In the event that the Respondents fail to take appropriate response action as required by this Section and EPA takes such action instead, Respondents shall reimburse EPA for all costs of the response action not inconsistent with the NCP, pursuant to Section XIX (Payments for Response Costs).

57. ~~58.~~ Nothing in the preceding Paragraph or in this Order shall be deemed to limit any authority of the United States or the State, including DTSC and RWQCB, to a) take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of hazardous substances on, at, or from the Site, or b) direct or order such action, or seek an order from a Court, to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site.

XIX. PAYMENTS FOR EPA FUTURE RESPONSE COSTS

58. ~~59.~~ The amounts to be paid by Respondents pursuant to Paragraph ~~69~~59 shall be deposited in the HPS Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

59. ~~60.~~ Payments for EPA Future Response Costs.

a. [EPA has expressed willingness to revise this model language, contingent on the retaining of the advance payment requirement.] Respondents shall pay to EPA all EPA Future Response Costs not inconsistent with the National Contingency Plan. Except as provided in Paragraph ~~69.59~~.c below, EPA will send Respondents, on a periodic basis, a bill requiring payment that includes a standard Regionally-prepared cost summary, which includes direct and indirect costs incurred by EPA and its contractors. Respondents shall make all payments within ~~30~~60 days of Respondents' receipt of each bill requiring payment, except as otherwise provided in Paragraph ~~70.60~~. Respondents shall make all payments required by this Paragraph by a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party making the payment, and EPA Site/Spill ID Number #XXXXX. Respondents shall send the check(s) to:

U.S. Environmental Protection Agency
Attn: Region 9 Receivables
P.O. Box 371099M
Pittsburgh, PA 15251

b. At the time of payment under Paragraph ~~69.59~~.a or ~~69.59~~.c, Respondents shall send notice that payment has been made to EPA and to the Regional Financial Management Officer, in accordance with Section XXXV (Notices and Submissions).

c. Within ~~30~~60 days of the Effective Date, Respondents shall pay to EPA \$ [to be determined] in prepayment of anticipated EPA Future Response Costs. The total amount paid shall be deposited by EPA in the HPS Special Account, within the EPA Hazardous Substance Superfund. These funds shall be retained and used by EPA to conduct or finance future response actions. Respondents shall make the payment required by this Paragraph by a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party making the payment, and EPA Site/Spill ID Number #XXXXX Respondents shall send the check(s) to:

U.S. Environmental Protection Agency
Attn: Region 9 Receivables
P.O. Box 371099M
Pittsburgh, PA 15251

In the event that the payments required by this subparagraph are not made within ~~30~~60 days of the Effective Date, Respondents shall pay Interest on the unpaid balance. The Interest on EPA Future Response Costs shall begin to accrue on the thirtieth day following the Effective Date. The Interest shall accrue through the date of the Respondents' payment. ~~Payments of Interest made under this subparagraph shall be in addition to such other remedies or sanctions available to EPA by virtue of~~

~~Respondents' failure to make timely payments under this Section including, but not limited to, payment of stipulated penalties pursuant to Paragraph 88.~~

~~[This suggests that stipulated penalties can be imposed for failing to make advance payments to EPA. That means that there would be interest assessed and penalties as well?]~~

After EPA issues its written Certification of Completion of Work and EPA has performed a final accounting of EPA Future Response Costs, EPA shall offset the final bill for EPA Future Response Costs by any unused amount paid by the Respondents pursuant to Paragraph ~~69.59~~69.59.a or Paragraph ~~69.59~~69.59.c. Any amount in excess of amounts due to EPA shall be returned to Respondents.

60. ~~61.~~ Respondents may contest payment of any EPA Future Response Costs under Paragraph ~~69.59~~69.59 if Respondents determines that EPA has made an accounting error or if Respondents alleges that a cost item that is included represents costs that are inconsistent with the NCP or if the cost is outside the definition of EPA Future Response Costs. Such objection shall be made in writing within ~~3045~~3045 days of receipt of the bill and must be sent to EPA pursuant to Section XXXV (Notices and Submissions). Any such objection shall specifically identify the contested EPA Future Response Costs and the basis for objection. In the event of an objection, the Respondents shall within the ~~3045~~3045-day period pay all uncontested EPA Future Response Costs to EPA in the manner described in Paragraph ~~69.59~~69.59. Simultaneously, the Respondents shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State and remit to that escrow account funds equivalent to the amount of the contested EPA Future Response Costs. The Respondents shall send to EPA, as provided in Section XXXV (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested EPA Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, the Respondents shall initiate the Dispute Resolution procedures in Section XXIII (Dispute Resolution). If EPA prevails in the dispute, within 5 days of the resolution of the dispute, the Respondents shall pay the sums due (with accrued interest) to EPA in the manner described in Paragraph ~~69.59~~69.59. If Respondents prevail concerning any aspect of the contested costs, the Respondents shall pay that portion of the costs (plus associated accrued interest) for which Respondents did not prevail to the United States in the manner described in Paragraph ~~69.59~~69.59; Respondents shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XXIII (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding the Respondents' obligation to reimburse EPA for its EPA Future Response Costs.

61. ~~62.~~ In the event that the payments required by Paragraph ~~69.59~~69.59.a. are not made within ~~3060~~3060 days of the Respondents' receipt of the bill, Respondents shall pay Interest on the unpaid balance. The Interest on EPA Future Response Costs shall begin

to accrue on 60 days after the date of the bill. The Interest shall accrue through the date of the Respondents payment. ~~Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to EPA by virtue of Respondents' failure to make timely payments under this Section including, but not limited to, payment of stipulated penalties pursuant to Paragraph 88.~~ The Respondents shall make all payments required by this Paragraph in the manner described in Paragraph ~~69.~~59.

62. ~~63.~~ Payment of DTSC Future Response Costs.

a. As of the Effective Date of this Order, Respondents shall pay all of DTSC's Future Response Costs related to the Work performed under this Order. DTSC will bill Respondents quarterly for its response costs. Respondents shall pay DTSC within sixty (60) days of date of invoice. Any billing not paid within sixty (60) days is subject to State Interest calculated from the date of the invoice pursuant to California Health and Safety Code section 25360.1. All payments made by Respondents pursuant to this Order shall be by cashier's or certified check made payable to "DTSC," and shall bear on the face the project code of the Site (Site _____) and the Docket number of this Order. Payments shall be sent to:

Department of Toxic Substances Control
Accounting/Cashier
1001 I Street, 21st Floor
P.O. Box 806
Sacramento, California 95812-0806

A photocopy of all payment checks shall also be sent to the person designated by DTSC to receive submittals under this Order.

b. If Respondents ~~disputes~~dispute a DTSC billing, or any part thereof, Respondents shall notify DTSC's assigned project manager and attempt to informally resolve the dispute with DTSC's project manager and branch chief. If Respondents desires to formally request dispute resolution with regard to the billing, Respondents shall file a request for dispute resolution in writing within 45 days of the date of the billing in dispute. The written request shall describe all issues in dispute and shall set forth the reasons for the dispute, both factual and legal. If the dispute pertains only to a portion of the costs included in the invoice, Respondents shall pay all costs which are undisputed in accordance with Subparagraph ~~72.~~62.a. The filing of a notice of dispute pursuant to this Paragraph shall not stay the accrual of DTSC interest on any unpaid costs pending resolution of the dispute. The written request shall be sent to:

Special Assistant for Cost Recovery and Reimbursement Policy
Department of Toxic Substances Control
P.O. Box 806
Sacramento, CA 95812-0806

A copy of the written request for dispute resolution shall also be sent to the person designated by DTSC to receive submittals under this Order. A decision on the billing dispute will be rendered by the Special Assistant for Cost Recovery and Reimbursement Policy or other DTSC designee.

63. ~~64.~~ Payment of RWQCB Future Response Costs.

a. As of the Effective Date of this Order, the Respondents are liable for all of the RWQCB's costs related to the Work performed under this Order in responding to the hazardous materials at the Site. Cost recovery may be pursued by the RWQCB under CERCLA, California Health and Safety Code Sections 25187.2 and 25360, California Water Code Sections 13304 and 13365, or any other applicable state or federal statute or common law. The RWQCB will bill the Respondents quarterly for oversight activities performed by the RWQCB hereunder. The Respondents shall pay the RWQCB within sixty (60) days of receipt of the RWQCB's billing. Any billing not paid within sixty (60) days is subject to State Interest calculated from the date of the billing pursuant to California Health and Safety Code section 25360.1. All payments made by the Respondents pursuant to this Order shall be by cashier's check or certified check made payable to the RWQCB and shall bear on the face the project code of the Site. Payments to the RWQCB shall be sent to:

State Water Resources Control Board
SLIC Program
P.O. Box 944212
Sacramento, CA 94244-2120

A photocopy of all payment checks shall also be sent to the person designated by the RWQCB to receive submittals under this Order.

b. If Respondents disputes a RWQCB billing, or any part thereof, Respondents shall notify the RWQCB's assigned project manager and attempt to informally resolve the dispute with the RWQCB's project manager and immediate supervisor. If Respondents desires to formally request dispute resolution with regard to the billing, Respondents shall file a request for dispute resolution in writing within 45 days of the date of the billing in dispute. The written request shall describe all issues in dispute and shall set forth the reasons for the dispute, both factual and legal. If the dispute pertains only to a portion of the costs included in the invoice, Respondents shall pay all costs which are undisputed in accordance with Subparagraph ~~73.63.~~63.a. The filing of a notice of dispute pursuant to this Paragraph shall not stay the accrual of RWQCB interest on any unpaid costs pending resolution of the dispute. The written request shall be sent to:

RWQCB Address/POC

A copy of the written request for dispute resolution shall also be sent to the person designated by the RWQCB to receive submittals under this Order. A decision on the billing dispute will be rendered by Mr. Landau, or his designee.

XX. INDEMNIFICATION AND INSURANCE**64. ~~65.~~ Respondents' Indemnification of the United States and State.**

a. The United States does not assume any liability by entering into this agreement or by virtue of any designation of Respondent SFRA as EPA's authorized representative under Section 104(e) of CERCLA, if applicable. Respondents shall indemnify, save and hold harmless the United States and the State and their officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Order, including, but not limited to, any claims arising from any designation of Respondents as EPA's authorized representative under Section 104(e) of CERCLA, if applicable. Further, the Respondents agree to pay the United States and the State all costs they incur including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States or the State based on negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Order. Neither the United States nor the State shall be held out as a party to any contract entered into by or on behalf of Respondents in carrying out activities pursuant to this Order. Neither the Respondents nor any such contractor shall be considered an agent of the United States or the State.

b. The United States and the State shall give Respondents notice of any claim for which the United States or the State plans to seek indemnification pursuant to Paragraph ~~74.~~64.a. and shall consult with Respondents prior to settling such claim.

65. ~~66.~~ Respondents waives all claims against and the State, including DTSC and RWQCB, for damages or reimbursement or for set-off of any payments made or to be made to the United States or DTSC and RWQCB arising from or on account of any contract, agreement, or arrangement between Respondents and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Respondents shall indemnify and hold harmless the United States and the State, including DTSC and RWQCB, with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Respondents and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays, provided, however, that nothing herein shall limit Respondents' right to claim that any delays caused by the United States and/or State, including the DTSC and RWQCB, constitute a force majeure event under this Agreement.

66. ~~67.~~ No later than 15 days before commencing any on-site Work, Respondents shall secure, and shall maintain until the first anniversary of EPA's last Certification of Completion of the Remedial Action applicable to the Site pursuant to

Section XVII (Certification of Completion), comprehensive general liability insurance with limits of five (5) million dollars, combined single limit, and automobile liability insurance with limits of one (1) million dollars, combined single limit, naming the United States, DTSC, and RWQCB as additional insureds. In addition, for the duration of this Order, Respondents shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Respondents in furtherance of this Order. Prior to commencement of the Work under this Order, Respondents shall provide to EPA, DTSC and RWQCB certificates of such insurance and a copy of each insurance policy. Respondents shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date. If Respondents demonstrates by evidence satisfactory to EPA, DTSC and RWQCB that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Respondents need provide only that portion of the insurance described above which is not maintained by the contractor or subcontractor.

XXI. FORCE MAJEURE

67. ~~68.~~ "Force majeure" for purposes of this Order, is defined as any event arising from causes beyond the control of the Respondents, of any entity controlled by Respondents, or of Respondents' contractors, that delays or prevents the performance of any obligation under this Order despite efforts to fulfill the obligation. Without limitation, a court-ordered injunction or stop work order related to any Work required by this Order is considered to be a force majeure event. In addition, Respondents' inability to perform Work required under this Order due to the Navy's failure or delay in addressing a Retained Condition, or any other breach of the ETCA by the Navy, shall be considered a force majeure event. The requirement that the Respondents exercise best efforts to fulfill the obligation includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. "Force Majeure" does not include a failure to attain the Performance Standards or financial inability to complete the Work, except to the extent that a failure by the Navy to fund all or a portion of the ETCA delays or prevents performance of obligations under this Order that are funded by the ETCA. Except as otherwise provided in this Paragraph ~~77.~~67., "Force Majeure" shall not, except as set forth above, include any delays caused by any disputes between the Navy and/or Respondents or any successors in title to the Site. Any delays caused by disagreements between or among EPA, DTSC and/or RWQCB, or any other regulatory agency with jurisdiction over any matter herein, shall be considered out of Respondents' control, shall be considered a force majeure event, and Respondents shall have no obligation under this Order to mitigate the effects of such force majeure event.

68. ~~69.~~ If any event occurs or has occurred that may delay the performance of any obligation under this Order, whether or not caused by a force majeure event, the

Respondents shall notify orally EPA's Project Coordinator, DTSC's Project Coordinator and RWQCB's Project Coordinator or, in his or her absence, their Alternate Project Coordinators or, in the event both of EPA's designated representatives are unavailable, the Director of the Superfund Division, EPA Region 9, within 48 hours of when Respondents first knew that the event might cause a delay. Within 14 days thereafter, Respondents shall provide in writing to EPA, DTSC and RWQCB an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; the Respondents' rationale for attributing such delay to a force majeure event if Respondents intend to assert such a claim; and a statement as to whether, in the opinion of the Respondents, such event may cause or contribute to an endangerment to public health, welfare or the environment. The Respondents shall include with any notice all available documentation supporting Respondents' claim that the delay was attributable to a force majeure event. Failure to comply with the above requirements shall preclude Respondents from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure.

69. ~~70.~~ If EPA, after consultation with DTSC and RWQCB, agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Order that are affected by the force majeure event will be extended by EPA, after consultation with DTSC and RWQCB, for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If EPA, after consultation with DTSC and RWQCB, does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify the Respondents in writing of its decision. If EPA, after consultation with DTSC and RWQCB, agrees that the delay is attributable to a force majeure event, EPA will notify the Respondents in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

70. ~~71.~~ If the Respondents elect to invoke the dispute resolution procedures set forth in Section XXIII (Dispute Resolution), Respondents shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Respondents shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Respondents complied with the requirements of Paragraphs ~~77~~67 and ~~78~~68, above. If Respondents carry this burden, the delay at issue shall be deemed not to be a violation by Respondents of the affected obligation of this Order identified to EPA.

XXII. EPA, DTSC AND RWQCB DISPUTE PROCESS

71. ~~72.~~ If disagreements or disputes arise during the consultation process between EPA, DTSC and RWQCB under this Order, EPA, DTSC and RWQCB agree to use the process outlined in this Paragraph 71 to resolve such disputes. EPA, DTSC and RWQCB shall, whenever possible, make decisions by consensus at the Project Coordinator level. In the event a consensus decision cannot be reached by the EPA, DTSC and RWQCB Project Coordinators concerning the approval of a document or deliverable required by this Order, a meeting or telephone conference shall be scheduled and held within five (5) days of DTSC and/or RWQCB raising the dispute among EPA, DTSC and RWQCB Project Coordinators and their immediate supervisors to reach a consensus decision. If consensus cannot be reached by the immediate supervisors, the dispute shall be immediately elevated to the EPA Region 9 Assistant Director of the Federal Facility and Site Cleanup Branch, the DTSC Supervising Hazardous Substances Engineer II, xxxxx Office, Brownfields and Environmental Restoration Program, and the RWQCB Section Chief, Site Cleanup Section, who shall meet or confer by telephone within ten (10) days of the meeting or telephone conference discussed above in an attempt to resolve the dispute through consensus. If no consensus can be reached, the dispute shall be immediately elevated to the EPA Region 9 Director of the Superfund Division, the DTSC Deputy Director for Site Mitigation and Brownfields Reuse, and the RWQCB Executive Officer, who shall meet or confer by telephone within ten (10) days of the meeting or telephone conference discussed in the previous sentence in an attempt to resolve the dispute through consensus. If no consensus can be reached, the decision applicable to Respondents shall be the final decision made by the EPA Region 9 Director of the Superfund Division. By agreeing to this decision making process, DTSC and RWQCB do not waive any right or claim each agency may have for relief, and reserve any authority they may have under federal or state law to require Waste Material cleanups compliant with such law.

XXIII. DISPUTE RESOLUTION

~~[NOTE: THIS NEEDS TO BE MUCH MORE ROBUST AND PROVIDE ADDITIONAL RIGHTS TO RESPONDENTS. DISPUTES CONCERNING INTERPRETATION OF RIGHTS AND OBLIGATIONS UNDER THE AOC SHOULD BE SUBJECT TO ALL RIGHTS AND REMEDIES AVAILABLE]~~

72. ~~73. Unless otherwise expressly provided for in this Order, the~~The dispute resolution procedures of this Section shall be ~~the exclusive mechanism~~utilized to resolve disputes between Respondents and EPA, ~~DTSC, or RWQCB~~ arising under or with respect to this Order, prior to the exercise of any other rights or remedies Respondents may have under applicable law to object to or challenge a decision of EPA under this Order. However, the procedures set forth in this Section shall not apply to actions by EPA to enforce obligations of the Respondents that have not been disputed in accordance with this Section. Additionally, this Section shall not apply to disputes regarding DTSC's Future Response Costs or RWQCB's Future Response Costs; such

disputes will be addressed in accordance with Paragraphs ~~72~~62 and ~~73~~63 above, respectively.

73. ~~74.~~ Any dispute which arises under or with respect to an EPA decision under this Order shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when Respondents sends the other Parties a written Notice of Dispute.

74. ~~75.~~ Statements of Position. In the event that the ~~parties~~Parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA, except on disputes regarding DTSC or RWQCB Future Response Costs reimbursement, shall be ~~binding~~final unless within 14 days after the conclusion of the informal negotiation period, Respondents invokes the formal dispute resolution procedures of this Section by serving on ~~EPA, with~~EPAwith copies concurrently provided to DTSC and RWQCB, a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any position and any supporting documentation relied upon by the Respondents.

75. ~~76.~~ Within 21 days after receipt of Respondents' Statement of Position, EPA will serve on all other parties its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. Within 7 working days after receipt of EPA's Statement of Position, Respondents may submit a Reply. DTSC and RWQCB may also file a Statement of Position for EPA's consideration on the disputed matter no later than 7 working days from receipt of EPA's Statement of Position.

76. ~~77.~~ Following receipt of all statements to be submitted pursuant to Paragraphs ~~84~~74 and ~~85~~75, the Director of the Superfund Division, EPA Region 9 will issue a final decision resolving the dispute. The Superfund Division Director's decision shall be ~~binding on the Respondents~~final. The invocation of formal dispute resolution procedures under this Section shall not restrict Respondents' rights and remedies available under applicable law.

77. ~~78.~~ The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of the Respondents under this Order, not directly in dispute, unless EPA, after consultation with DTSC and RWQCB, agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph ~~89~~79. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of notice of noncompliance with any applicable provision of this Order. In the event that the Respondents do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XXIV (Stipulated Penalties). If Respondents prevail on the disputed issue, the stipulated penalties shall be discharged.

XXIV. STIPULATED PENALTIES

78. ~~79.~~ A Respondent shall be liable for stipulated penalties in the amounts set forth in Subparagraphs ~~88.~~78.a. and b. to EPA, DTSC, and RWQCB, with 50% of such penalties to be paid to EPA and 50% to DTSC and RWQCB, for failure to comply with the requirements of this Order specified below, unless excused under Section XXI (Force Majeure). Payment of stipulated penalties to DTSC and RWQCB shall be split evenly, unless otherwise directed in the demand letter set forth in Paragraph ~~94.~~81. “Compliance” by a Respondent shall include completion of the activities required to be completed by that Respondent under this Order or any work plan or other plan approved under this Order identified below in accordance with all applicable requirements of law, this Order, the SOW, and any plans or other documents approved by EPA pursuant to this Order and within the specified time schedules established by and approved under this Order. Except with respect to an emergency or other situation described in Section ~~66~~56 above, a Respondent shall not be liable for the stipulated penalties set forth in this Section as a result of the failure of the other Respondent to comply with the Order.

a. Stipulated Penalty Amounts – Work, including Payment of Future Response Costs.

The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Subparagraph (i): ~~[note — these amounts are what was negotiated at Fort Ord]~~

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500	1st through 30th day
\$1,500	30th through 45th day
\$15,000	45th day and beyond

i. Compliance Milestones. The following shall constitute general categories of “compliance milestones” subject to stipulated penalties under Paragraph ~~88.~~78.a. Specific documents within Paragraph ~~88.~~78.a (1) – (6) shall be subject to the stipulated penalties set forth above to the extent such documents have been designated “critical path” documents by Respondents in each Monthly Progress Report and subject to reasonable approval by EPA.

- 1) Remedial Design Document
- 2) Remedial Action Work Plan

- 3) Institutional Controls Implementation Plan
- 4) Operations and Maintenance Plan
- 5) Remedial Action Completion Report
- 6) Work Status Report
- 7) Late Payment of EPA, DTSC, or RWQCB Future Response Costs
- 8) Failure to comply with any use restrictions selected in the RODs
- 9) Failure to provide access pursuant to Paragraph ~~43~~35
- b. Stipulated Penalty Amounts – Reports.

The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports or other written documents not within the scope of Subparagraph ~~88~~78.a. (1) above, and any other violation of this Order:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$250	1st through 30th day
\$1,000	30th through 45th day
\$10,000	45th day and beyond

79. ~~80.~~ All penalties shall begin to accrue on the day after EPA has given Respondents written notice of noncompliance pursuant to Paragraph 80 and shall continue to accrue through the final day of the correction of the noncompliance. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission under Section XIV (EPA Approval of Plans and Other Submissions), except as set forth in Paragraph ~~58~~48; (2) with respect to a decision by the Director of the Superfund Division, EPA Region 9, under Paragraph ~~86~~76 of Section XXIII (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that Respondents' reply to EPA's Statement of Position is received until the date that the Director issues a final decision regarding such dispute Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Order.

80. ~~81.~~ Following EPA's determination that Respondents have failed to comply with a requirement of this Order, EPA ~~may~~shall give Respondents written notification of the same and describe the noncompliance. After this notification and a 30-day period in which Respondents can cure the noncompliance, EPA may send the Respondents a written demand for the payment of the penalties. ~~However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified the Respondents of a violation.~~

81. ~~82.~~ All penalties accruing under this Section shall be due and payable within ~~30~~60 days of the Respondents' receipt from EPA of a demand for payment of the penalties, unless Respondents invokes the Dispute Resolution procedures under Section XXIII (Dispute Resolution). All payments to EPA under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to U.S. Environmental Protection Agency, Attn: Region 9 Receivables, P.O. Box 37109M, Pittsburgh PA 15262-0001, shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID #0941. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to EPA, DTSC, and RWQCB as provided in Section XXXV (Notices and Submissions). All payments to DTSC and RWQCB under this Section shall be due and payable within ~~30~~60 days of the Respondents' receipt from DTSC and the RWQCB of a demand for payment of the penalties, unless Respondents invokes the Dispute Resolution procedures under Section XXIII (Dispute Resolution). All payments to DTSC under this section shall be paid by cashier's or certified check made payable to "DTSC," and shall bear on the face the Docket number of this Order. Payments shall be sent to:

Department of Toxic Substances Control
Accounting/Cashier
1001 I Street, 21st Floor
P.O. Box 806
Sacramento, California 95812-0806

All payments to RWQCB under this section shall be paid by certified or cashier's check(s) made payable to the State Water Resources Control Board Cleanup and Abatement Account and shall bear on the face the Docket number of this Order. Payment shall be sent to California Regional Water Quality Control Board, Central Valley Region, 11020 Sun Center Drive, #200, Rancho Cordova, CA 95670. **[Correct region?]**

82. ~~83.~~ The payment of penalties shall not alter in any way Respondents' obligation to complete the performance of the Work required under this Order.

83. ~~84.~~ Penalties shall continue to accrue as provided in Paragraph ~~89~~79 during any dispute resolution period, but need not be paid until the following: If the dispute is resolved by agreement, or by a decision of EPA, accrued penalties determined to be owing shall be paid to EPA within ~~15~~30 days of the agreement or the receipt of EPA's decision or order. If Respondents prevail on the disputed issue, the stipulated penalties shall be discharged.

84. ~~85.~~ If Respondents fail to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as interest. Respondents shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph ~~90~~80.

85. ~~86.~~ Nothing in this Order shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by

virtue of Respondents' violation of this Order or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA, provided, however, that EPA shall not seek civil penalties pursuant to Section 122(l) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of the Order.

86. ~~87.~~ Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Order.

XXV. COVENANT NOT TO SUE BY EPA

87. ~~88.~~ In consideration of the actions that will be performed and the payments that will be made by Respondents under the terms of this Order, and except as otherwise specifically provided in this Order, EPA covenants not to sue or to take administrative action against Respondents pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for Existing Contamination. This covenant not to sue shall take effect upon the Effective Date and is conditioned upon the ~~complete~~continuing and satisfactory performance by Respondents of all obligations under this Order, including, but not limited to, payment of Future Response Costs pursuant to Section XIX. This covenant not to sue is also conditioned upon the veracity of information provided to EPA by the Respondents in this Order, ~~including the representations made pursuant to Paragraphs 4 and 62.~~ This covenant not to sue extends only to Respondents and does not extend to any other person.

XXVI. RESERVATIONS OF RIGHTS BY EPA

88. ~~89.~~ Except as specifically provided in this Order, nothing herein shall limit the power and authority of EPA to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Site. Further, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Order, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondents in the future to perform additional activities pursuant to CERCLA or any other applicable law.

89. ~~90.~~ The covenant not to sue set forth in Section XXV above does not pertain to any matters other than those expressly identified therein. EPA reserves, and

this Order is without prejudice to, all rights against Respondents with respect to all other matters, including, but not limited to:

- a. claims based on a failure by Respondents to meet a requirement of this Order;
- b. liability based on Respondents' transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal of Waste Material at or in connection with the Site, other than as provided in a ROD, this Order, or otherwise ordered by EPA, after signature of this Order by the Respondents;
- c. criminal liability;
- d. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- e. liability arising from the past, present, or future disposal, of Waste Materials outside of the Site, unless such Waste Materials constitute Navy-Retained Conditions; ~~[NEED TO CONSIDER HOW MIGRATION OFF THE ACES SHOULD BE TREATED HERE]~~
- f. liability for violations of federal or state law which occur during or after implementation of Removal or Remedial Actions; and
- g. liability for additional response actions that EPA determines are necessary to achieve Performance Standards.

XXVII. DTSC AND RWQCB COVENANT NOT TO SUE

90. ~~91.~~ In consideration of the actions that will be performed and the payments that will be made by Respondents under the terms of this Order, and except as otherwise specifically provided in this Order, DTSC and RWQCB covenant not to sue or to take administrative action against Respondents pursuant to Section 107(a) of CERCLA, 42 U.S.C. §9607(a), or Section 7003 of RCRA, 42 U.S.C. 6973 for Existing Contamination. This covenant not to sue shall take effect upon the Effective Date and is conditioned upon the ~~complete~~continuing and satisfactory performance by Respondents of all obligations under this Order, including, but not limited to, payment of Future Response Costs pursuant to Section XIX. This covenant not to sue is also conditioned upon the veracity of information provided to DTSC and RWQCB by the Respondents in this Order, ~~including the representations made pursuant to Paragraphs 4 and 62.~~ This covenant not to sue extends only to Respondents and does not extend to any other person. ~~[We need to discuss the public process/time required for 7003 CNTS.]~~

[We need to discuss the public process/time required for 7003 CNTS.]

XXVIII. DTSC AND RWQCB RESERVATIONS OF RIGHTS

91. ~~92.~~ The covenant not to sue by DTSC and RWQCB set forth in Section XXVII does not pertain to any matters other than those expressly identified therein. DTSC and RWQCB reserve, and this Order is without prejudice to, all rights against Respondents with respect to all other matters, including but not limited to:

- (a) claims based on a failure by Respondents to meet a requirement of this Order;
- (b) liability for costs incurred or to be incurred by the State that are not reimbursed by Respondents pursuant to this Order, except for Navy-Retained Conditions;
- (c) liability for performance of response actions other than the Work approved under the Order performed by Respondents pursuant to this Order, except for Navy-Retained Conditions;
- (d) criminal liability;
- (e) liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- (f) liability arising from the past, present, or future disposal, of Waste Materials outside of the Site, unless such Waste Materials constitute Navy-Retained Conditions; and
- (g) liability for violations of local, state or federal law or regulations.

XXIX. COVENANTS BY RESPONDENTS

92. ~~93.~~ Respondents ~~covenants~~covenant not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, or the State, or its contractors and employees, with respect to Existing Contamination, Future Response Costs, or this Order, including, but not limited to:

- a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;
- b. any claims against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Work required by this Order; or
- c. any claim arising out of the Work or arising out of the response actions for which the Future Response Costs have or will be incurred, including any

claim under the United States Constitution, the State Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law.

d. This paragraph is not applicable to actions against the United States Navy.

~~NEED TO WORK THIS OUT WITH THE NAVY~~

93. ~~94.~~ These covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraph 99 (b), (c), (d), and (f) – (g), but only to the extent that Respondents' claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

94. ~~95.~~ Nothing in this Order shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

XXX. OTHER CLAIMS

95. ~~96.~~ By issuance of this Order, the United States, including EPA, and the State, including DTSC and RWQCB, assume no liability for injuries or damages to persons or Site resulting from any acts or omissions of Respondents.

96. ~~97.~~ No action or decision by EPA pursuant to this Order, including remedy selection by EPA, shall give rise to any an independent right to judicial review. ~~Respondents waives any right it may have to bring an action under Section 310 of CERCLA, 42 U.S.C. §9659, related to any response action conducted pursuant to this Order on the Site.~~

XXXI. CONTRIBUTION

97. ~~98.~~ Nothing in this Agreement precludes the United States, the State, or Respondents from asserting any claims, causes of action, or demands for indemnification, contribution, or cost recovery against any person not a party to this Order, including any claim Respondents may have pursuant to Section 107(a)(4)(B). Nothing herein diminishes the right of the United States, pursuant to Sections 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2),(3), to pursue any such persons to obtain additional response costs or response actions and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

98. ~~99.~~ In the event of a suit or claim for contribution brought against Respondents, notwithstanding the provisions of Section 107(r)(1) of CERCLA, 42

U.S.C. § 9607(r)(1), with respect to Existing Contamination (including any claim based on the contention that either Respondents is not a BFPP, or has lost its status as a BFPP as a result of response actions taken in compliance with this Order or at the direction of EPA's Remedial Project Manager), the Parties agree that this Order shall then constitute an administrative settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that Respondents would be entitled, from the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Order. The "matters addressed" in this Order are all response actions taken or to be taken and all response costs incurred or to be incurred by the United States, DTSC, RWQCB or by ~~any other person~~Respondents with respect to Existing Contamination.

99. ~~100.~~ In the event Respondents were found, in connection with any action or claim it may assert to recover costs incurred or to be incurred with respect to Existing Contamination, not to be a BFPP, or to have lost its status as a BFPP as a result of response actions taken in compliance with this Order or at the direction of EPA's Remedial Project Manager), the Parties agree that this Order shall then constitute an administrative settlement within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), pursuant to which Respondents have resolved their liability for all response actions taken or to be taken and all response costs incurred or to be incurred by EPA, DTSC, RWQCB or by ~~any other person~~Respondents with respect to Existing Contamination.

100. ~~101.~~ Respondents agree that with respect to any suit or claim brought by it for matters related to this Order they will notify EPA, DTSC, and RWQCB in writing no later than 60 days prior to the initiation of such suit or claim.

101. ~~102.~~ Respondents also agree that with respect to any suit or claim for contribution brought against it for matters related to this Order they will notify in writing EPA, DTSC, and RWQCB within 10 days of service of the complaint on it.

XXXII. NONCOMPLIANCE, STOP WORK AND DEFAULT DETERMINATIONS

102. ~~103.~~ Respondents shall perform and complete all necessary response actions at the Site, ~~(except for Navy-Retained Conditions)~~ in accordance with CERCLA, the NCP, ARARs not otherwise waived, and relevant guidance.

103. ~~104.~~ Notices of Noncompliance and Stop Work. Following EPA's determination, after consultation with DTSC and RWQCB, that Respondents have failed to comply with a material requirement of this Order, EPA ~~may~~shall give Respondents written notification of the same, with a copy to DTSC, and RWQCB and describe the noncompliance ("Notice of Noncompliance"). EPA ~~may~~shall also give Respondents written notification that Respondents should stop work on all or any portion of its response action activities at the Site until EPA determines that Respondents have remedied such noncompliance ("Notice to Stop Work"). Upon receipt of a Notice to Stop Work, Respondents shall immediately stop work on all or any portion of its

response action activities at the Site as specified in such notice, and shall remedy the noncompliance. Respondents shall resume such response action activities only upon receipt of written notification from EPA, after consultation with DTSC and RWQCB, that Respondents may proceed with such activities as specified in the notification.

104. ~~105.~~ Finding of Default. EPA, after consultation with DTSC and RWQCB, may determine that a Default has occurred in one or more of the following situations: (i) EPA has issued to Respondents two or more Notices of Noncompliance for significant noncompliance, with or without accompanying Notices to Stop Work, pursuant to Paragraph 113; (ii) EPA determines that either Respondent is implementing the Work in a manner that may cause endangerment to human health or the environment; (iii) EPA determines that either Respondent has effectively ceased to perform all or a portion of the Work for any reason, including lack of Navy funding through the ETCA, except for a Force Majeure event pursuant to Section XXI that results in only a temporary delay in performance; (iv) either Respondents misappropriates or misuses funds received under the ETCA; or (v) Respondents is substantially and consistently deficient or late in its performance of the Work. Prior to issuance of a Finding of Default, EPA shall provide Respondents in writing (with copies to the Navy, DTSC and RWQCB) with a Notice of Intent to Find Default and of the proposed basis for issuing a Finding of Default. Respondents may dispute the Notice of Intent to Find Default, in accordance with the process provided in Section XXIII (Dispute Resolution). In the event of an EPA determination that a Default has occurred, either without Respondents having invoked the Dispute Resolution process in Section XXIII, or following the conclusion of such Dispute Resolution process, EPA will send Respondents a written Finding of Default, with copies to the Navy, DTSC, and RWQCB. The Finding of Default will provide the basis for EPA's determination and will specify whether Respondents may continue to perform the Work while the Navy prepares to resume response action activities under the Amended FFA.

105. ~~106.~~ Within thirty (30) days of Respondents' receipt of the Finding of Default, or such other time period specified by EPA, Respondents shall cease performance of the Work.

106. ~~107.~~ In the event that the Navy resumes performance of response action activities under the Amended FFA, Respondents shall fully cooperate in the orderly transfer of responsibilities for performance of the Work to the Navy.

XXXIII. ACCESS TO INFORMATION

107. ~~108.~~ Respondents shall provide to EPA, DTSC and RWQCB upon request, copies of all documents and information within Respondents' possession or control or that of its contractors or agents relating to activities at the Site or to the implementation of this Order, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Respondents

shall also make available to EPA, DTSC and RWQCB for purposes of investigation, information gathering, or testimony, Respondents' employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

a. Business Confidential and Privileged Documents. Respondents may assert business confidentiality claims covering part or all of the documents or information submitted to EPA, DTSC and RWQCB under this Order to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, DTSC and RWQCB or if EPA has notified Respondents that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondents.

b. The Respondents may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Respondents asserts such a privilege in lieu of providing documents, Respondents shall provide EPA, DTSC and RWQCB with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by Respondents. However, no documents, reports or other information created or generated pursuant to the requirements of the Order shall be withheld on the grounds that they are privileged.

c. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

XXXIV. RETENTION OF RECORDS

108. ~~109.~~ Until 10 years after the Respondents' receipt of EPA's notification pursuant to Paragraph ~~65.55~~.c. of Section XVII (Certification of Completion of the Work), Respondents, or their successors, shall preserve and retain all non-identical copies of the last draft or final version of documents or records (including documents or records in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work; provided, however, that Respondents (and its contractors and agents) must retain, in addition, copies of all data generated during the performance of the Work and not contained in the aforementioned documents required to be retained. Each of the above

record retention requirements shall apply regardless of any corporate retention policy to the contrary. [RESERVED FOR FURTHER MODIFICATIONS]

109. ~~110.~~ At the conclusion of this document retention period, Respondents, or its successor, shall notify EPA, DTSC and RWQCB at least 90 days prior to the destruction of any such records or documents, and, upon request by EPA or DTSC, Respondents shall deliver any such records or documents to EPA, DTSC and RWQCB. Respondents may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondents assert such a privilege, Respondents shall provide EPA, DTSC and RWQCB with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Respondents. However, no documents, reports or other information created or generated pursuant to the requirements of the Order shall be withheld on the grounds that they are privileged.

XXXV. NOTICES AND SUBMISSIONS

110. ~~111.~~ Whenever under the terms of this Order, written notice is required to be given or a report or other document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Order with respect to EPA, DTSC, RWQCB and the Respondents, respectively.

As to the EPA:

Keith Takata
Director, Superfund Division
United States Environmental Protection Agency
Region 9
75 Hawthorne St.
San Francisco, CA 94105

and

EPA Project Coordinator, SFD-8-1
United States Environmental Protection Agency
Region 9
75 Hawthorne St.
San Francisco, CA 94105

As to the Regional Financial Management Officer:

Chief, Cost Accounting
United States Environmental Protection Agency
Region 9
75 Hawthorne St.
San Francisco, CA 94105

As to the California Department of Toxic Substances Control:

Anthony J. Landis, P.E.
Chief
Northern California Operations
Office of Military Facilities
Department of Toxic Substance Control
8800 Cal Center Drive
Sacramento, CA 95826

and

Project Manager
Brownfields and Environmental Restoration Program
Department of Toxic Substances Control

XXXVI. APPENDICES

111. ~~112.~~ The following appendices are attached to and incorporated into this Order:

- A. Legal Description of the Site
- B. Map of the Site
- C. Statement of Work
- ~~D. Known Conditions Documentation~~
- E. RI Areas
- F. Land and Water Use Restrictions

XXXVII. COMMUNITY RELATIONS

112. ~~113.~~ Respondents shall prepare and submit for review and approval by EPA, in consultation with DTSC and RWQCB, a Community Relations Plan, as defined in the SOW. EPA, after consultation with DTSC and RWQCB, will determine the appropriate role for the Respondents under the Plan. Respondents shall also cooperate

with EPA, DTSC, and RWQCB in providing information regarding the Work under this Order to the public. As requested by EPA, Respondents shall participate in the preparation of such information for dissemination to the public and in public meetings which may be held or sponsored by EPA to explain activities at or relating to the Site or the Work being conducted under this Order.

XXXVIII. MODIFICATIONS

113. ~~114.~~ EPA, after consultation with DTSC and RWQCB, may determine that in addition to tasks defined in the SOW, or initial approved work plans, other additional work may be necessary to accomplish the Performance Standards. To the extent that such additional work is within the scope of the RODs and does not otherwise constitute an amendment, modification or supplement to the RODs, EPA, after consultation with DTSC and RWQCB, may request in writing that Respondents perform these response actions and Respondents shall confirm its willingness to perform the additional work, in writing, to EPA, DTSC, and RWQCB within 14 days of receipt of EPA's request, or Respondents may invoke dispute resolution in accordance with Section XXIII. Subject to EPA resolution of any dispute, Respondents shall implement the additional tasks which EPA, after consultation with DTSC and RWQCB, determines are necessary. Any other requirements of this Order may be modified in writing by mutual agreement of the parties.

114. ~~115.~~ If Respondents seek permission to deviate from any approved work plan or schedule or the SOW, except as otherwise provided in the Remedial Action Work Plan, Respondents' Project Coordinator shall submit a written request to EPA, DTSC and RWQCB for approval outlining the proposed modification and its basis. Respondents may not proceed with the requested deviation until receiving written approval from the EPA Project Coordinator, after consultation with the DTSC Project Coordinator and the RWQCB Project Coordinator.

115. ~~116.~~ No informal advice, guidance, suggestion, or comment by the EPA, DTSC, or RWQCB Project Coordinator or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondents shall relieve Respondents of its obligation to obtain any formal approval required by this Order, or to comply with all requirements of this Order, unless it is formally modified in accordance with this Section.

116. ~~117.~~ This Order shall be made available for a period of not less than thirty (30) days for public notice and comment. The United States, DTSC and RWQCB reserve the right to withdraw or withhold their consent if the comments regarding the Order disclose facts or considerations which indicate that the Order is inappropriate, improper, or inadequate.

XXXIX. TERMINATION

117. ~~118.~~ This Order shall terminate under one or more of the following circumstances:

- a. Upon a Finding of Default by EPA, in consultation with DTSC and RWQCB, under Paragraph ~~114~~104;
- b. Upon EPA's Certification of Completion of the Work, pursuant to Paragraph ~~65~~55; or
- c. Upon termination of the ETCA, this Order shall terminate with respect to any Remedial Action for which EPA has not yet issued a Certification of Completion of Remedial Action. Upon termination of the ETCA, this Order shall remain effective with respect to any Remedial Action and Work for which EPA has already issued the Certification of Completion of Remedial Action.

XL. EFFECTIVE DATE

118. ~~119.~~ This Order shall be effective when EPA issues written notice to Respondents that each of the following conditions have been met: a.) the expiration of the public notice and comment period for this Order and EPA's determination that comments received, if any, do not require EPA to modify or withdraw from this Order; b.) the completion of the public comment process on the FOSET; c.) the execution of the ETCA and the Amended FFA; and d.) EPA's approval of and the Governor of the State of California's concurrence with the Covenant Deferral Request.

ADMINISTRATIVE ORDER ON CONSENT
FOR RI/FS AND RD/RA FOR CLEANUP
OF PORTIONS OF THE FORMER HPNS

For Respondents:

Agreed this ____ day of _____,
2____.

ADMINISTRATIVE ORDER ON CONSENT
FOR RI/FS AND RD/RA FOR CLEANUP
OF PORTIONS OF THE FORMER HPNS

For EPA:

Agreed this ____ day of _____,
2____.

Michael Montgomery
Assistant Director of Federal Facilities and Site
Cleanup Branch
U.S. Environmental Protection Agency
Region IX
75 Hawthorne St.
San Francisco, CA 94105

Date

Robert G. Carr
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region IX
75 Hawthorne St.
San Francisco, CA 94105

ADMINISTRATIVE ORDER ON CONSENT
FOR RI/FS AND RD/RA FOR CLEANUP
OF PORTIONS OF THE FORMER HPNS

For the United States:

Agreed this ____ day of _____,
2_____.

Assistant Attorney General
Environment and Natural Resources Section
U.S. Department of Justice
Washington, D.C. 20530

ADMINISTRATIVE ORDER ON CONSENT
FOR RI/FS AND RD/RA FOR CLEANUP
OF PORTIONS OF THE FORMER HPNS

For DTSC:

Agreed this ____ day of _____,
2____.

ADMINISTRATIVE ORDER ON CONSENT
FOR RI/FS AND RD/RA FOR CLEANUP
OF PORTIONS OF THE FORMER HPNS

For RWQCB:

Agreed this ____ day of _____,
2____.
